87-1104

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

RALPH KEMP, WARDEN,
Petitioner,

v.

WILLIAM NEAL MOORE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

What type of proof establishes the "new law exception" to the abuse of the writ doctrine, sufficient to render excusable a petitioner's abusive conduct in failing to assert a claim in a prior federal habeas corpus petition?

II.

What type of proof establishes that the "ends of justice" would be served by relitigating death penalty sentencing phase claims previously adjudicated adversely to a petitioner, a question which was not addressed in *Sanders v. United States,* 373 U.S. 1 (1963) or *Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 4, 1984, and July 27, 1987.

The initial opinion of the United States District Court for the Southern District of Georgia denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived was entered on May 22, 1984. On June 4, 1984, a panel of the United States Court of Appeals for the Eleventh Circuit

affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir. 1984). (Appendix A). The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit granted rehearing *en banc*. (Appendix B). On July 27, 1987, the *en banc* court of the Eleventh Circuit reversed the district court's finding of abuse in part and remanded the case in part. (Appendix C). *Moore v. Kemp*, 824 F.2d 847 (11th Cir. 1987) (*en banc*). Petitioner's petition for rehearing was denied by the Eleventh Circuit on October 7, 1987. (Appendix D).

o

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit entered its opinion of which Petitioner seeks review on July 27, 1987. Petitioner's petition for rehearing was denied by the Eleventh Circuit Court of Appeals on October 7, 1987. A stay of the mandate was granted until December 15, 1987.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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STATUTORY PROVISIONS

STATEMENT OF THE CASE

Rule 9(b) of 28 U.S.C. § 2254:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on

the merits, or if new and different grounds were alleged, the judge finds that the failure of the Petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Respondent, William Neal Moore, was indicted by the grand jury in the Superior Court of Jefferson, Georgia for the offenses of malice murder and the armed robbery of Fredger Stapleton. Respondent waived a trial by jury with respect to both charges on June 4, 1974, and thereupon entered a plea of guilty to these charges. Respondent's sentencing hearing was set for July 17, 1974. On that date, the trial court, acting as sentencer, imposed the death penalty upon Respondent following the receipt of certain testimony and evidence for the court's consideration.

Respondent's convictions and sentences were affirmed on direct appeal to the Supreme Court of Georgia in *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). In its opinion, the Supreme Court of Georgia conducted its sentence review, which is mandatory under Georgia law in all cases in which the death penalty has been imposed, in accordance with O.C.G.A. § 17-10-35. This Court denied Respondent's petition for a writ of certiorari on July 6, 1976, in *Moore v. Georgia*, 429 U.S. 873 (1976).

A petition for a declaratory judgment was denied by the Superior Court of Jefferson County and the judgment of that court was affirmed by the Supreme Court of Georgia in *Moore v. State*, 239 Ga. 67, 235 S.E.2d 519 (1977). A petition for a writ of certiorari to review this judgment was denied by the Court in *Moore v. Georgia*, 434 U.S. 878 (1977).

Respondent, represented by counsel, filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on March 30, 1978, in connection with Respondent's state habeas corpus petition. On July 13, 1978, the state habeas corpus court denied Respondent the relief sought. On October 17, 1978, the Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal.

On November 22, 1978, Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia. Following a hearing on June 18, 1979, the district court granted federal habeas corpus relief, vacating Respondent's sentence of death on the basis that the penalty was cruel and unusual under the circumstances of this case. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and Respondent cross-appealed.

Following oral argument, the Eleventh Circuit Court of Appeals reversed the district court's judgment, insofar as the district court had conducted its own proportionality review, but granted habeas corpus relief on the basis that the sentencing court had unconstitutionally applied a nonstatutory aggravating circumstances. Petitioner filed a suggestion for rehearing *en banc* based on the latter portion of the panel opinion. The petition for rehearing *en banc* was granted, with the prior panel opinion dated June 23, 1983, being withdrawn and a new opinion, dated September 3, 1983, being substituted in its place. In its decision of September 30, 1983, the Eleventh Circuit

reversed that portion of the prior opinion granting federal habeas corpus relief.

Respondent Moore then filed a petition for rehearing and suggestion for rehearing *en banc* which was denied by the Eleventh Circuit on December 13, 1983. Next, Respondent filed a petition for a writ of certiorari which was denied by this Court on March 5, 1984.

On March 12, 1984, the district court made the judgment of the circuit court its judgment in the case of *Moore v. Balkcom and Bolton*, Civil Action No. 478-309. A new execution date was scheduled for Respondent for May 24, 1984. Respondent filed a successive petition for state habeas corpus relief in the Superior Court of Butts County, Georgia. On May 17, 1984, a hearing was held in the Superior Court of Butts County, Georgia on Respondent's motion for a stay of execution and on Petitioner's motion to dismiss the petition for writ of habeas corpus as successive within the meaning of O.C.G.A. § 9-14-51. On May 18, 1984, the Superior Court of Butts County, Georgia entered an order dismissing the petition as successive within the meaning of O.C.G.A. § 9-14-51. Respondent sought an application for a certificate of probable cause to appeal from the order of the Superior Court of Butts County, but this application was denied on May 18, 1984.

Also on May 18, 1984, Respondent filed a successive application for federal habeas corpus relief in the district court, raising some of the issues contained in the successive petition for a writ of habeas corpus filed in Butts County and other issues previously raised in other state court proceedings.

On May 21, 1984, a hearing was held in the United States District Court for the Southern District of Georgia in order to allow Respondent an opportunity to present evidence and oral argument as to each of the claims raised by Respondent on their merits, as well as to respond to the Petitioner's allegation that the successive federal habeas corpus petition constituted an abuse of the writ within the meaning of Rule 9(b).

On May 22, 1984, the district court entered an order denying Respondent's application for a stay of execution, denying Respondent habeas corpus relief and finding certain allegations to constitute an abuse of the writ and to be waived, but granting Respondent's application for a certificate of probable cause to appeal. (Appendix A). Respondent filed a notice of appeal to the Eleventh Circuit on May 22, 1984.

Oral argument was conducted before a panel of the Eleventh Circuit on May 24, 1984, following the granting of the stay of execution on May 23, 1984, by the Eleventh Circuit. On June 4, 1984, the panel of the Eleventh Circuit affirmed the decision of the district court and adopted the district court's opinion. *Moore v. Zant,* 734 F.2d 585 (11th Cir. 1984). (Appendix A).

The panel opinion was vacated by order of the Eleventh Circuit dated June 20, 1984, in which order the Eleventh Circuit also granted rehearing *en banc.* (Appendix B). On July 27, 1987, the *en banc* court reversed the district court's finding of abuse in part and remanded the case in part. *Moore v. Kemp,* 824 F.2d 847 (11th Cir. 1984). (Appendix C).

Petitioner's suggestion for rehearing *en banc* was denied by the Eleventh Circuit on October 7, 1987. (Appendix D).

Petitioner seeks review of the *en banc* decision of the Eleventh Circuit dated July 27, 1987, declining to conclude that the entire successive application for federal habeas corpus relief constitutes an abuse of the writ. (Appendix C).

REASONS FOR GRANTING THE WRIT

I. THERE EXISTS NO GUIDANCE FROM THIS COURT AS TO THE TYPE OF PROOF SUFFICIENT TO ESTABLISH THE "NEW LAW EXCEPTION" TO THE ABUSE OF THE WRIT DOCTRINE NECESSARY TO RENDER EXCUSABLE A PETITIONER'S ABUSIVE CONDUCT IN FAILING TO ASSERT A CLAIM IN A PRIOR PETITION.

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that a second application for federal habeas corpus relief may be dismissed where there are new and different grounds alleged than in the prior petition and "the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

In *Sanders v. United States,* 373 U.S. 1 (1963), the Court addressed the question of under what circumstances a federal district court may refuse to review the merits of a "successive" petition for a writ of habeas corpus, i.e., a petition which raised grounds previously adjudicated

adversely on the merits to the petitioner in a prior proceeding. In *Sanders v. United States, supra,* the Court determined that a federal district court can refuse to entertain such a successive petition where "the ends of justice would not be served by reaching the merits of the subsequent application." *Sanders v. United States, supra* at 18.

This Court has attempted to define the concept "ends of justice", which concept was left without precise definition by the Court in *Sanders v. United States, supra. See Kuhlmann v. Wilson,* — U.S. —, 106 S.Ct. 2616 (1986). However, neither in *Sanders* nor in *Kuhlmann v. Wilson, supra,* did the Court address those types of petitions anticipated by Rule 9(b) in which claims omitted from an initial petition are presented for litigation on their merits in a subsequent petition based on an assertion by the petitioner that these omitted claims are now based on "new law".

The appropriate treatment to be given "new law" claims is only briefly mentioned in Rule 9(b) itself. Rule 9(b) notes the district courts' obligation to consider whether a petitioner's delay in presenting a "new claim" constitutes an abuse of the writ so as to warrant the district court to decline to review the new issues on their merits. This obligation was similarly discussed by the Court in *Sanders v. United States, supra* at 17. The disposition to be made of "new law" claims is briefly discussed in the Advisory Committee Notes to Rule 9(b). These notes discuss the requirement of subsection (b) "that the judge finds a petitioner's failure to have asserted the new grounds in the prior petition to be inexcusable." The Advisory Committee Notes also cite a noninclusive list of circumstances in which the failure to raise claims in a prior petition may be excusable, i.e., a retroactive change in the law and newly discovered evidence.

This case clearly presents for review the increasingly recurring issue of the proper application to be made of Rule 9(b) to new law claims. Respondent Moore has asserted that his six allegations, not raised in his prior application, should be considered for the first time in a subsequent application because there has allegedly been "new law" decided which touches upon these allegations.[1] Respondent in this case has attempted to excuse his abusive conduct solely by invoking the "new law" exception to the abuse of the writ doctrine.

Although it is well-settled that it is within the sound discretion of federal district court judges to determine whether a federal habeas corpus petitioner's conduct is abusive or excusable and thereby determine whether a new claim should be reviewed on its merits when raised for the first time in a second application, case law provides little guidance to federal district court judges in the exercise of their sound discretion as to "new law" claims. *See Sanders v. United States, supra* at 1079. In fact, the majority

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[1]As noted in the *en banc* decision of the circuit court in this case, Respondent asserted six allegations not raised in his prior application, which allegations Respondent claimed were based on "new law" and only one claim which he contended should be considered for the first time in his second application based on "newly discovered facts." *Moore v. Kemp, supra,* at 860.

of the case law discusses the raising of new claims when the claims have been "deliberately withheld" from a prior application, or where a claim has been "abandoned" during the litigation of a first application. *See Sanders v. United States, supra,* at 18 and *Moore v. Kemp,* 824 F.2d 847, 861 (11th Cir. 1987). Case law provides no guidance for what constitutes a sufficient excuse for simply omitting a claim from an initial application, as opposed to deliberately withholding or abandoning a claim. Further, there exists no guidance as to when the assertion that there is "new law" concerning a claim in fact excuses a failure for not having presented the claim in an earlier petition.

The Eleventh and Fifth Circuits have held that a court may refuse to litigate a claim on the merits if the failure of the petitioner to raise the claim in a prior proceeding was the result of "inexcusable neglect." *See Moore v. Kemp, supra* at 862, *citing Papskar v. Estelle,* 612 F.2d 1003, 1006 (5th Cir.), *cert. denied,* 449 U.S. 885 (1980); *Funchess v. Wainwright,* 788 F.2d 1443, 1445 (11th Cir. 1986) (*per curiam*); *Stephens v. Kemp,* 721 F.2d 1300, 1303 (11th Cir. 1983) (*per curiam*), *cert. denied,* 469 U.S. 1043 (1984); *Potts v. Zant,* 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied,* 454 U.S. 877 (1981) and *Haley v. Estelle,* 632 F.2d 1273, 1275 (5th Cir. Unit A 1980). However, the excusable neglect concept has not been definitively addressed by this Court so as to articulate what constitutes the proper standard for review of new law claims and if so, what constitutes inexcusable neglect for failing to raise a claim in an initial application.

In this case, the majority of the *en banc* court in *Moore v. Kemp, supra,* attempted to flesh out the concept of "excusable conduct" or "inexcusable neglect" with reference

to new law claims. However, in the absence of relevant, definitive authority, the majority resorted to borrowing principles from other legal doctrines in an attempt to carve out the new law exception for new claims raised in abusive applications for habeas corpus relief. *Moore v. Kemp, supra* at 851. Petitioner respectfully submits that the result of the majority's borrowing of legal underpinnings from other doctrines for application in the context of abuse of the writ cases in effect sanctions the filing of eleventh hour successive petitions, especially in death penalty cases. This radical extension of exceptions to the abuse doctrine, utilizing principles from other doctrines, conflicts with the intent behind the enactment of Rule 9(b) and traditional notions of comity, finality and equity which underlie the abuse of the writ doctrine. *Moore v. Kemp,* 824 F.2d 847, 878 (Hill, J., dissenting).

Additionally, not only does the majority opinion in this case inappropriately borrow standards from other doctrines in attempting to define and apply the "new law" exception, but the majority opinion also inappropriately creates a subjective, rather than objective, test for determining whether a claim could have been raised previously or is based on "new law". The majority of the *en banc* court held that "the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal application." *Moore v. Kemp, supra* at 851. By creating a standard which focuses predominately on a petitioner's subjective knowledge at the time of the first application, rather than a petitioner's actual conduct, the circuit court's decision forces reviewing courts to attempt to subjectively divine what knowledge a fed-

eral habeas corpus petitioner's attorney actually had at the time the initial federal habeas corpus petition was filed.

Under this new subjective standard adopted by the circuit court, the burden of proof is removed from the petitioner, and placed on the State. The State, in order to create a factual basis from which to infer "knowledge" on the part of a petitioner, must demonstrate that the petitioner's attorney had available to him or her the "ingredients" necessary to raise a particular constitutional claim. This conflicts with Rule 9(b) which requires the burden to be placed on a petitioner to excuse his or her conduct, utilizing equitable principles. *See Moore v. Kemp, supra,* Tjoflat, J., dissenting, p. 862.

To apply this subjective test, the circuit court in this case grafts the forseeability requirement of procedural default cases onto the abuse of the writ doctrine. The adoption of the forseeability requirement dangerously affords a means for a petitioner to cavalierly excuse his conduct in failing to raise a claim by stating that the legal principle now being asserted as a "new claim" was "not forseeable by counsel". *Moore v. Kemp,* Tjoflat, J., dissenting opinion, n. 16. This subjective test affords no guidance for determining what conduct should be found abusive. Petitioner respectfully submits that instruction and guidance is needed from this Court to direct lower federal courts in the manner in which abusive conduct of a petitioner should be reviewed and under what circumstances a petitioner should be precluded from litigating "new claims" based on so-called "new law".

In short, Petitioner submits that the standard adopted in this case by the circuit court with respect to the "new

law" exception to the abuse of the writ doctrine, inexplicitly and intolerably creates a standard that allows federal habeas corpus petitioners to utilize their counsel as convenient excuses for failing to raise claims. Additionally, the circuit court's standard constitutes a totally subjective and unworkable standard for reviewing a petitioner's knowledge, rather than his or her conduct, in determining whether there has been an abuse of the writ. Finally, the circuit court's approach recklessly grafts the concept of forseeability from procedural default cases onto an abuse of the writ analysis although totally different policy concerns underlie these two doctrines.

For all of these reasons, Petitioner respectfully submits that this Court should grant a writ of certiorari to address and define the "new law" exception to Rule 9(b) and its application, especially in the context of death penalty cases.

II. THE LOWER FEDERAL COURTS ARE IN NEED OF GUIDANCE IN DETERMINING WHAT PROOF ESTABLISHES THAT "THE ENDS OF JUSTICE" WOULD BE SERVED BY RELITIGATION OF DEATH PENALTY SENTENCING PHASE CLAIMS PREVIOUSLY ADJUDICATED ADVERSELY TO A PETITIONER.

As was noted previously, in *Kuhlmann v. Wilson, supra,* the Court granted a writ of certiorari to consider when the "ends of justice" required consideration of a successive habeas corpus petition. *Kuhlmann v. Wilson, supra* at 2621-2622. The Court explicitly stated that it had granted the writ of certiorari in *Kuhlmann v. Wilson* because the previous decision of the Court in *Sanders* had

"provided little specific guidance to what kind of proof that a prisoner must offer to establish that the 'ends of justice' would be served by relitigation of the claims previously decided against him." *Kuhlmann v. Wilson, supra* at 2622. As this Court also noted in *Kuhlmann,* the failure to provide clear guidance to district court judges in applying the "ends of justice" standard leaves open the opportunity for arbitrary decisions in federal habeas corpus cases. *Id.*

Petitioner does not merely ask this Court to resolve the issue set out in *Kuhlmann v. Wilson, supra,* but rather submits that this case warrants review with respect to the application of the ends of justice test to successive applications in the context of a case in which a person convicted and sentenced to death seeks to relitigate issues relating to the sentencing phase of his or her trial, which issues have been previously adjudicated adversely to the petitioner. It is critical for district courts to be guided as to under what circumstances, sentencing phase allegations are entitled to be relitigated.

In Judge Hill's separate dissenting opinion in this case, he notes that the application of the "ends of justice" test to successive claims in the context of a death penalty case and the need, or lack thereof, of a showing of a colorable claim of factual innocence, presents a unique question. Judge Hill observed:

> In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocense, I would interpret 'innocence' where the death penalty is involved as being innocence of any statutory aggravating circumstance essential to eligibility for the death penalty.

> The Petitioner in this case makes no claim of innocence; he long ago and promptly confessed to murder accompanied by statutory aggravating circumstances.

Moore v. Kemp, Hill, J., dissenting, p. 878.

Petitioner respectfully submits that due to the frequency of successive applications in the context of death penalty cases, as well as the increasing frequency of attacks on alleged defects in the critical sentencing phase of capital cases, this Court should grant review to determine when a capital litigant is entitled to relitigate claims relating to the sentencing phase, either with or without a colorable showing of factual innocence. Of course, the question then arises as to what constitutes "factual innocense" in the context of a death penalty case, if the grounds of the petition only seek to attack the sentencing phase. This particular case presents an even more compelling factual scenario, as Respondent pled guilty to the crimes charged and therefore, has confessed his factual guilt of these offenses from the outset.

The unique nature of the sentencing feature of a death penalty case and the critical nature of the sentencing phase makes pressing this Court's attention to successive claims relating to the sentencing phase of capital cases. Petitioner submits that in applying the "ends of justice" test in the context of the sentencing phase of a capital case, the only proper question to be addressed is whether the sentencing authority was mislead in its determination of whether a statutory aggravating circumstances factual existed beyond a reasonable doubt. Petitioner submits that the question is not whether the collateral reviewing court agrees with the policy determinations made by the sen-

tencer as to the appropriate punishment to be imposed. *See Collins v. Francis*, 728 F.2d 1322, 1341 (11th Cir. (1984); *Zant v. Stephens*, 456 U.S. 410 (1982).

Petitioner submits that an appropriate "ends of justice" analysis must afford deference to policy determinations regarding the appropriate punishment to be imposed made by a state court sentencing authority. This deference is warranted based on the insulation statutorily afforded under Georgia law via the requirement that a statutory aggravating circumstance first be found beyond a reasonable doubt. *See Zant v. Stephens, supra.* Thus, the ends of justice would not require relitigation of Respondent's successive claim raised in this case, because there has been a previous determination that there exists a valid statutory aggravating circumstances authorizing Respondent's death sentence. The only remaining decision to be made by the sentencer was whether, as a policy matter, the death sentence was appropriate in the context of this case. Petitioner respectfully submits that federal habeas corpus courts should not review policy determinations properly made by state sentencers, as long as the factual bases supporting the necessary statutory aggravating circumstances are shown to exist beyond a reasonable doubt.

The ends of justice analysis utilized by the circuit court with respect to successive capital sentencing phase claims is unworkable and does not provide sufficient guidance to consider what is an appropriate application of the ends of justice analysis to successive claims raised within the parameters of the sentencing phase under Georgia law.

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CONCLUSION

For all of the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari to provide guidance on the application of the "new law" exception to the abuse of the writ doctrine and the application of the "ends of justice test" to successive petitions brought by habeas corpus petitioners under a death sentence raising claims concerning the sentencing phase.

Respectfully submitted,

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APPENDIX A

William Neal MOORE,
Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 84-8423.

United States Court of Appeals,
Eleventh Circuit.

June 4, 1984.

Opinion on Rehearing En Banc June 20, 1984.

Appeal from the United States District Court for the Southern District of Georgia.

Before FAY, VANCE and KRAVITCH, Circuit Judges.

BY THE COURT:

This matter was presented to us upon the appellant's motion for stay of execution, the appellee's motion for expedited review and the appellee's motion to dismiss the appeal. With the execution of appellant scheduled for 12:15 a.m. on May 24, 1984, the court entered a stay in order that an expedited hearing could be held. This was accomplished during the afternoon of May 24, 1984 in Atlanta, Georgia.

Having heard oral argument, reviewing briefs of counsel and studying the record, we affirm the judgment denying relief. Finding ourselves in complete agreement with the evaluation of the issues, the authorities cited as controlling and the conclusions made by the district judge in his Order of May 22, 1984, we adopt the same and append it hereto. The stay previously entered is hereby vacated.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

WILLIAM NEAL MOORE,

Petitioner

VS.

WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent

ORDER

Before the Court is the petition of William Neal Moore for a Writ of Habeas Corpus and an Order staying his execution by the State of Georgia.

I. *Background*

Petitioner murdered Fredger Stapleton in Stapleton's home during the course of an armed robbery on April 2, 1974. He waived trial by jury in the Superior Court of Jefferson County on June 4, 1974, and pleaded guilty to all charges. Judge McMillan sentenced Moore to death on July 17, 1974. Thereafter, Petitioner embarked on a ten-year trek through the state and federal court systems, seeking relief from his conviction and sentence.

The Georgia Supreme Court affirmed Moore's conviction and sentence in February, 1975, and later denied his petition for a rehearing. *Moore v. State,* 233 Ga. 861, 213

S.E.2d 829 (1975). The United States Supreme Court also denied review. *Moore v. Georgia,* 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976), *petition for reh'g denied,* 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976). Petitioner thereafter sought a declaratory judgment in State court, wherein he sought a new sentencing proceeding. Relief was denied and the denial was affirmed by the Georgia Supreme Court. *Moore v. State,* 239 Ga. 67, 235 S.E.2d 519 (1977), *cert. denied,* 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159 (1977).

Petitioner's first trip through the state habeas process resulted in no relief. *Moore v. Hopper,* CV78-22 (Sup.Ct. Tattnall Cty.1978). On October 17, 1978, the Georgia Supreme Court denied Moore's application for certificate of probable cause to appeal that decision.

Petitioner sought federal habeas relief in this Court in 1978. His first petition was voluntarily dismissed without prejudice after the Georgia Supreme Court granted a stay of execution. The execution was rescheduled for December 4, 1978. Moore again sought relief in this Court on November 22, 1978. At that time, he was again granted a stay of execution to permit this Court's consideration of his legal arguments supporting his grounds for relief.

This Court concluded that Moore's guilty plea was voluntarily, intelligently, and knowingly made. The Court further concluded that he was aware of his right to withdraw his guilty plea when he chose otherwise and that the absence of a transcript of closing arguments at his sentencing hearing did not prevent adequate appellate review.

This Court did conclude, however, that certain constitutional mandates were not observed in the state's appel-

late review of the sentencing. *Moore v. Zant,* 513 F.Supp. 772, 818 (S.D.Ga.1981). More specifically, that the imposition of the death penalty was based primarily on the location of the killing—at the victim's home—and not on the presence of the aggravating circumstances (that Moore committed malice murder while in the commission of another capital crime, armed robbery) articulated in the trial judge's order. The Georgia Supreme Court, which was bound by state statute to perform a proportionality review, failed to compare cases involving a killing in the home. Since that court violated its statutory duty to review similar cases by focusing on cases involving different circumstances, this Court undertook an independent proportionality review and concluded that the death penalty "shocked the conscience," warranting habeas relief.

On appeal, the Eleventh Circuit panel reversed this Court's judgment, concluding that an independent proportionality review should not have been conducted. The panel also concluded, however, that the state trial court had committed constitutional error in imposing the death sentence on the basis of nonstatutory aggravating circumstances. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir.1983). The respondent filed a suggestion for rehearing *en banc* on the latter portion of the panel decision. The petition was granted and the panel decision was withdrawn for *en banc* consideration.

Citing *Zant v. Stephens,* — U.S. —, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (narrowing function of statutory aggravating factors is achieved when a death sentence is supported by at least one of the statutory aggravating circumstances), the *en banc* court reversed that portion of the

panel decision granting habeas corpus relief. *Moore v. Balkcom,* 716 F.2d 1511 (11 Cir. 1983).

On petition for rehearing and suggestion for rehearing *en banc,* Moore argued that while the Georgia Supreme Court considered all mitigating circumstances, the sentencing judge limited his consideration to a finding that Moore had made true statements and had cooperated with the authorities. Moore further argued that Judge McMillan "viewed the death sentence as mandatory in this case and did not understand that he possessed discretion to impose a life sentence. *Moore v. Balkcom,* 722 F.2d 629 (11th Cir. 1983). The Eleventh Circuit panel concluded that there was no basis in the record in the case to support either of these arguments. The suggestion for rehearing *en banc* was denied. *Id.,* at 630.

Once again Moore petitioned the United States Supreme Court for review and once again it was denied. *Moore v. Balkcom,* — U.S. —, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

Moore again instituted state habeas proceedings on May 11, 1984. On May 18, 1984, the Superior Court of Butts County, Georgia, dismissed the petition as successive within the meaning of O.C.G.A. § 9-14-51. The Georgia Supreme Court denied review on the same day. That afternoon, Moore filed for federal habeas relief in this court. Execution is scheduled for May 24, 1984. Consideration of his application for a stay of execution must therefore be made "within the shadow of the date and time set for execution." *Stephens v. Kemp,* — U.S. —, —, 104 S.Ct. 562, 562, 78 L.Ed.2d 370, 372 (1983) (dissenting opinion).

II. *Conclusion*

Petitioner has presented nine grounds for relief:

1) The State failed to inform petitioner of his right to remain silent and of his right to counsel prior to a custodial interrogation performed for the purpose of gathering relevant sentencing information.

2) Petitioner was sentenced on the basis of materially false and misleading information contained in the presentence report.

3) The sentencing judge relied in part on a presentence report to which neither petitioner nor his counsel were afforded a meaningful opportunity of review.

4) The false and misleading information in the presentence report violated the mandate of *Proffitt v. Wainwright,* 685 F.2d 1227 (11th Cir.1982), *modified,* 706 F.2d 311 (11th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), insofar as the information was not presented in open court, by sworn witnesses subject to cross-examination.

5) The presentence report defects prevented petitioner from obtaining a meaningful appellate review in violation of his Eighth and Fourteenth Amendments.

6) Petitioner's death sentence is excessive and disproportionate under the Eighth and Fourteenth Amendments since it was imposed despite his repeated and uncontradicted denial of any intent to kill the victim. *See Enmund v. Florida,* 458 U.S. 782, 798, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982).

7) Petitioner is an indigent black man convicted of the murder of a black man. His sentence and execution

therefore will be arbitrary and unconstitutional in light of the State's alleged practice of discriminating on the basis of race of both the victim and the defendant. *See Spencer v. Zant,* 715 F.2d 1562 (11th Cir.1983), *vacated for reh'g en banc,* 715 F.2d 1562 (1983); *McCleskey v. Zant,* 580 F. Supp. 338 (N.D.Ga.1984), *app. pending,* 729 F.2d 1293, No. 84-8176 (to be argued before 11th Cir., *en banc,* in June, 1984); *Ross v. Hopper,* 716 F.2d 1528 (11th Cir.1983), *vacated for reh'g en banc,* 729 F.2d 1293 (11th Cir.1984).

8) Petitioner received ineffective assistance of counsel during the sentencing phase before the trial court.

9) Since the sentencing judge expressly relied on the prospect of appellate review or the United States Supreme Court's invalidation of Georgia's capital statutes, it attached diminished consequences to the sentence of death as imposed and thus took less than full responsibility for the sentencing decision in violation of petitioner's Eighth and Fourteenth Amendment right.

Respondent has pleaded abuse of the writ, shifting to petitioner the burden to prove by a preponderance of the evidence that he has not engaged in that conduct. *Stephens v. Kemp,* 721 F.2d 1300, 1303 (11th Cir.), *reh'g en banc denied,* 722 F.2d 627 (11th Cir.), *application for stay granted,* — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983); *Price v. Johnston,* 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1947); *Jones v. Estelle,* 722 F.2d 159, 164 (5th Cir. 1983). Under the Rules Governing Section 2254, Cases in the United States District Courts. (hereafter 28 foll. § 2254),

> [a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different

> grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b). "The doctrine of abuse of the writ has developed as a result of the familiar rule of law that a denial of an application for habeas corpus is not *res judicata* with respect to subsequent applications." *Potts v. Zant*, 638 F.2d 727, 738 (5th Cir. Unit B 1981) citing *Sanders v. United States*, 373 U.S. 1, 7, 83 S.Ct. 1068, 1072, 10 L.Ed.2d 148 (1963).

> Because of the inapplicability of *res judicata* to habeas corpus, prisoners have in the past frequently filed successive petitions, alleging claims already adequately determined in prior petitions, *or alleging different claims which could have been adequately pleaded and adjudicated in prior petitions.* In order to curb the opportunity for prisoners to file nuisance or vexatious petitions, and to ease the burden on the courts arising from such petitions, guidelines have evolved as to when a district court, in the exercise of its sound judicial discretion, may decline to entertain on the merits a successive or repetitious petition. These guidelines reflect a concern that in the absence of abuse, a federal district court will adjudicate at least once the claims of a petitioner.

Potts, at 738. (Emphasis added). *See also Fay v. Noia*, 372 U.S. 391, 423, 83 S.Ct. 822, 840, 9 L.Ed.2d 837 (1963).

The *Sanders* court divided into two categories successive applications for habeas relief. The first classification specified the principles governing successive motions based on grounds previously addressed by the habeas

courts. The second classification includes both those successive applications that assert grounds different from those presented in a prior application, along with those that assert grounds presented earlier but not adjudicated on the merits.

> Regarding the first classification, a federal court may give controlling weight . . . to denial of a prior application for federal habeas . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant to the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

Smith v. Kemp, 715 F.2d 1459, 1468 (11th Cir.1983), *application to vacate stay denied*, — U.S. —, —, 104 S.Ct. 19, 55, 77 L.Ed.2d 1414, 1446, — U.S. —, 104 S.Ct. 55, 78 L.Ed.2d 74 (1983), citing *Sanders*, 373 U.S. at 15, 83 S.Ct. at 1077; *cert. denied*, — U.S. —, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983). In *Smith*, the Eleventh Circuit emphasized that

> [i]n determining whether the "ends of justice" would be served by readdressing the merits of the same contention as raised in the prior petition, we must look at objective factors, such as whether this was a full and fair hearing with respect to the first petition and whether there has been an intervening change in the law. [cits]

Id.

A district court may avoid full consideration of the merits regarding the second (new claims) classification only if there has been an abuse of the writ. In order to find an abuse of writ, the Court must find that presentation of wholly new issues resulted from 1) the intentional

withholding or intentional abandonment of those issues on the initial petition, or 2) inexcusable neglect. *Stephens, supra,* 721 F.2d at 1303, citing *Potts v. Zant,* 638 F.2d 727, 740-41 (5th Cir. Unit B), *cert. denied,* 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *see also Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.1980), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980). The Petitioner must show the absence of inexcusable neglect.

> According to *Fay* [*v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) relied on by the *Sanders* court], a petitioner loses the right to have a claim considered on a successive petition if he "understandingly and knowingly forewent the privilege," 372 U.S. at 439 [83 S.Ct. at 849] [cits], of raising the claim in his initial petition. The bar "depends on the considered choice of the petitioner." *Id.* But note that the inquiry is not whether the petitioner intended to give up his right to have a claim heard at all. It is whether he withheld it without legal excuse when he filed his earlier petition.

Jones v. Estelle, 722 F.2d 159, 163 (5th Cir.1983). Withholding or failing to timely present a claim may be deemed to be an "abuse of the writ."

The "abuse of the writ doctrine should be governed by equitable principles." *Stephens, supra,* — U.S. at —, 104 S.Ct. at 563, 78 L.Ed.2d at 373; citing *Sanders v. United States,* 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed. 2d 148 (1963). In *Sanders,* the court

> noted that consideration of abuse normally is left to the 'discretion of federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits.'

Stephens, — U.S. at —, 104 S.Ct. at 563, 78 L.Ed.2d at 373, quoting *Sanders,* 373 U.S. at 18, 83 S.Ct. at 1078.

Thus, this Court should look to Petitioner's reasons for not having raised in his earlier petition the claims raised in support of his present petition, in addition to any claims previously raised and addressed and those raised but not addressed. Case law in this circuit indicates that this must be done in light of the fact that "[t]he 'abuse of the writ' doctrine is of rare and extraordinary application. *Paprskar v. Estelle,* 612 F.2d at 1007; *Hardwick v. Doolittle,* 558 F.2d 292, 296 (5th Cir.1977), *cert. denied,* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 [cits] (1978); *Simpson v. Wainwright,* 488 F.2d 494, 495 (5th Cir. 1973); *see also Galtieri v. Wainwright,* 582 F.2d 348, 368 (5th Cir.1978) (*en banc*) (J. Goldberg, dissenting)." *Potts,* at 741 (footnote omitted). Accordingly,

> [i]f a petitioner is able to present some 'justifiable reason' explaining his actions, reasons which 'make it fair and just for the trial court to overlook' the allegedly abusive conduct, the trial court should address the successive petition. *Price v. Johnston,* 334 U.S. 266 at 291 [68 S.Ct. 1049 at 1063, 92 L.Ed. 1356] [cits]; *Paprskar v. Estelle, supra.*
>
> *Potts,* at 741.

These general principles boil down to the idea that a petitioner can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ

> or a development in facts which was not reasonably knowable before.

Jones v. Estelle, 722 F.2d 159, 165 (5th Cir.1983) (footnotes omitted).

Regarding the "changes in the law" consideration, the *Jones* court acknowledged that "the Supreme Court in *Engle v. Isaac*, 456 U.S. 107 [102 S.Ct. 1558, 71 L.Ed.2d 783] (1982) [cits] charges a prisoner with a duty to anticipate changes at the pain of forfeiture under a state contemporaneous objection rule,[ ]" *id.*, at n. 5. The court expressly declined, however, to "define the scope of a petitioner's needs to anticipate changes in the law or decide whether the *Engle* duty extends to a habeas petitioner attempting to explain omitted claims." *Id.*

The Jones court did emphasize that less solicitude should be given petitioners who, as in the instant case, were represented by counsel during earlier habeas proceedings. *See also Woodard v. Hutchins*, — U.S. —, —, n. 3, 104 S.Ct. 752, 753 n. 3, 78 L.Ed.2d 541, 544 n. 3 (1984).

Finally, despite the "rare and extraordinary application" of Rule 9(b) alluded to in *Potts*, it is apparent that a majority of the Supreme Court, faced with an irksome series of eleventh hour appeals, has underscored the necessity of the Rule.

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward—often in a piecemeal fashion—only after the execution date is set or becomes imminent Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus.

Woodard v. Hutchins, — U.S. —, —, 104 S.Ct. 752, 753, 78 L.Ed.2d 541, 545 (1984) (five Justices concurring in per curiam opinion); *see also Antone v. Dugger*, — U.S. —, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984); *Jones v. Estelle*, 722 F.2d 159 (5th Cir.1983). Citing *Woodard*, the Eleventh Circuit recently barred an untimely insanity claim because of abuse or writ in *Gooch v. Wainwright*, 731 F.2d 1482 (11th Cir.1984).

Petitioner asserts that four of the above claims were not previously presented to this Court because they depend upon changes in the law occurring subsequent to the filing of his state and federal habeas petitions in 1978. He maintains, that a fifth claim depends on the independent development, since 1978, of facts that show a constitutional violation. Three other claims have been presented previously to this Court by Petitioner's former attorney in an amendment to his 1978 petition. Those claims were not considered because this Court declined to permit such amendment, granting relief on other grounds. The ninth claim, Petitioner asserts, "was not present previously because of conflicts between petitioner and his state habeas corpus counsel, and because of the unfamiliarity of that counsel with relevant facts and legal principles." Petition at 6.

Finally, where such procedural default principles are applicable, Petitioner must show cause and prejudice before this Court can consider his claims, even where abuse of writ is not evident. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Weber v. Israel*, 730 F.2d 499 (7th Cir.1984) (where state

withholds right of appellate review of issues not raised at trial, federal courts will not undermine state's interest in orderly procedure by allowing defendant to litigate in federal habeas proceeding; federal habeas relief unavailable absent showing of cause and actual prejudice; *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir.1983); *Shriner v. Wainwright*, 715 F.2d 1452, 1458 (11th Cir.1983).

The Court will therefore examine each claim for "abuse of writ" and waiver purposes and address those issues warranting treatment on the merits.

A. *The Estelle v. Smith Claim*

Petitioner argues that the state failed to inform him, while he was in custody, of his right to remain silent and of his right to counsel prior to questioning by a probation officer preparing a presentence report. He bases this claim on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

In *Smith*, a court ordered the psychiatric examination of the defendant while he was in custody. Smith was not advised of his right to remain silent; nor was he told that any statement he made could be used against him at the ensuing sentencing hearing. Applying *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966) and *In Re Gault*, 387 U.S. 1, 52, 87 S.Ct. 1428, 1456, 18 L.Ed.2d 527 (1967), the court held that admission of the interviewing doctor's testimony at the sentencing phase of his trial violated Smith's Fifth Amendment privilege against compelled self-incrimination. The court further held that Smith's Sixth Amendment rights were violated, citing, *inter alia*, *Kirby v. Illinois*, 406 U.S. 682, 688-

689, 92 S.Ct. 1877, 1881-1882, 32 L.Ed.2d 411 (1972). Finally, in *Battie v. Estelle*, 655 F.2d 692, 699 (5th Cir.1981) the court held that "*Smith* did not establish a new principle of federal constitutional law because that decision merely applied already fixed principles to a new factual situation[,]" thus warranting retroactive application.

Respondent argues that since *Smith* was merely an extension of existing constitutional law, Petitioner should have raised this claim in his earlier habeas petitions. In fact, Petitioner did raise in his first state habeas petition the contents of his presentence report, asserting that neither he nor his counsel had been afforded an adequate opportunity to review its contents and to explain or rebut it prior to sentencing. The first state habeas court found that Petitioner's attorney was furnished with a copy of the report in question and this Court declined to address the claim primarily on that ground. *Blake v. Zant*, 513 F.Supp. 772, 805 (S.D.Ga.1981). Therefore, Respondent argues, both the contents of the report and the report itself have been previously litigated. Further, according to Respondent, since no "new" changes in the law have occurred, and since previous litigation shows that Petitioner could have raised this issue in the past (especially in the first federal habeas proceeding), this claim should be dismissed as an abuse of writ.

Petitioner insists that Smith was a "new" change in the law and that the equitable considerations inherent in Rule 9(b) disallow a bar of this claim under the "abuse of writ" doctrine. Furthermore, Petitioner submitted at the May 21, 1984 hearing the affidavit of his first habeas counsel, James C. Bonner. Mr. Bonner attests that former

defense counsel included in the first federal habeas petition only exhausted claims. He was "unaware of any federal constitutional basis upon which he could argue that the failure of the probation officer to warn Mr. Moore violated the federal constitution." Second Bonner Affidavit 2.

Disposition of this claim thus turns on whether the change in the law was sufficient to constitute a "justifiable reason . . . mak[ing] it fair and just for t[his Court] to overlook the allegedly abusive conduct. . . ." *Potts*, at 741. That is, the Court must consider whether Petitioner met his burden of proving excusable neglect in not raising this issue in past petitions. *Jones v. Estelle, supra*, at 164 & n.4, 165.

Relevant to this inquiry is the fact that Petitioner was represented by counsel, as opposed to proceeding *pro se*. This Court finds persuasive the Fifth Circuit's reasoning in *Jones* that less deference may be given to Petitioner's reasons for neglected claims when Petitioner has been represented by counsel. However, the *Jones* court considered "new" claims in a successive petition, noting that the "new" claims were not based on a later change in law. 722 F.2d at 167 n. 8.

Also relevant to this Court's inquiry is the fact that *Potts, Paprskar, Haley v. Estelle*, 632 F.2d 1273 (5th Cir. 1980) and *Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978), among other "abuse of writ" cases,[1] may have had

1. There was no need to question the standard for abuse of the writ in *Stephens v. Kemp, supra*, 721 F.2d 1300, which was later stayed, since the issues were largely disposed of on the merits or on other grounds.

their vitality weakened by recent Supreme Court cases concerning exhaustion. This trend was recognized by the *Jones* court.

> Underlying *Galtieri* and *Paprskar* was a greater willingness to tolerate unexhausted claims than the Supreme Court in *Rose v. Lundy*, 455 U.S. 509 [102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)] [cits], later made plain was allowable. *Galtieri* allowed appellate disposition of mixed petitions and *Paprskar* dwelled upon the absence of connection between the exhausted and non-exhausted claims. . . .
>
> The *Lundy* court's call for the dismissal of mixed petitions would have little meaning if it could be avoided by withholding unexhausted claims, or deleting them by an amended petition. Justice O'Connor's plurality opinion noted that its rule of dismissal, calculated to accommodate concerns for federalism and finality of conviction with access for state prisoners to the federal courts, required the doctrine of writ abuse for its enforcement.

Jones, 722 F.2d at 168 (footnote omitted).

Further question concerning what degree of deference should be given to "new law" claims is raised by the Supreme Court's decision in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). In *Engle*, assertions by state prisoners in federal habeas corpus proceedings that jury instructions given at their trials violated their due process rights were barred because the prisoners did not comply with a state contemporaneous objection rule. Specifically, Isaac failed to comply with an Ohio court rule mandating contemporaneous objections to jury instructions. Ohio law required defen-

dants to prove an affirmative defense by a preponderance of the evidence. Ten months after his conviction, however, the Ohio Supreme Court ruled the jury instructions defective. Nevertheless, Isaac was denied the benefit of that ruling because he failed to object to the instructions at trial, as mandated by state law. Isaac raised a constitutional challenge to the jury instructions in federal court under 28 U.S.C. § 2254, in effect arguing that the instructions incorporated an unconstitutional burden-shifting. The district court determined that the claim was waived by Isaac's failure to object at trial and that no cause or prejudice could be shown. The Sixth Circuit reversed, ruling that *Wainwright v. Sykes* did not preclude consideration of Isaac's due process claim. Rather, the court found that the Ohio courts had consistently held defendants to the burden of proving affirmative defenses by a preponderance of the evidence. The futility of objecting to the instructions at trial supplied adequate cause for Isaac's waiver.

In reversing the Sixth Circuit, the Supreme Court reaffirmed the rule of *Wainwright v. Sykes* and held that Isaac waived his claim by failing to object at trial. The court found no cause for Isaac's default based on the asserted ground that he could not have known at the time that the Due Process clause addressed the burden of proving affirmative defenses. The Court held this despite petitioners' arguments that they could not have known at the time of trial that the state jury instructions were constitutionally objectionable. The court emphasized that numerous defendants had previously relied on *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.

2d 508 (1975). "In most cases, the defendants' claims countered well-established principles of law." 456 U.S. 132, 102 S.Ct. 1574. In light of the many challenges made elsewhere, the court "could not say that [the state prisoners] lacked the tools to construct their constitutional claim."

> We need not decide whether the novelty of a constitutional claim ever established cause for failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair.
>
> 456 U.S. at 131, 102 S.Ct. at 1573.

Further expounding on that theme, the court stated:

> We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.
>
> 456 U.S. at 134, 102 S.Ct. at 1574.

It is true that "exhaustion" (*Rose*) and "procedural default" (*Engle*) case law analysis is being intermixed in this Court's "new law," abuse-of-writ analysis. It is also true, however, that the underlying policies of comity and

finality of litigation seen in *Rose* and *Engle*, along with *Woodard v. Hutchins*, and *Antone v. Dugger, supra*, cannot be ignored. *Jones, supra; see also Barefoot v. Estelle*, — U.S. —, —, 103 S.Ct. 3383, 1391-1392, 77 L.Ed.2d 1090, 1100-1101 (1983). Indeed, the *Jones* court, when considering abuse of writ in the "new claims" context, referred to the *Engle* court's reasoning without deciding whether the *Engle* duty to anticipate future changes in the law extends to a habeas petitioner attempting to explain omitted claims. 722 F.2d at 165 n. 5. *Jones* did expressly refer to this underlying concern, however, when it noted that the case before it

> does not present the question of whether a lawyer's omission of a claim from an earlier writ petition may be excused by a later change in law which could have reasonably been anticipated. Relatedly, note the suggestion of Justice Blackmun that a state could require a petitioner to assert all claims in a single petition. Escape from a failure to do so would be measured by *Wainwright v. Sykes*, 433 U.S. 72 [97 S.Ct. 2497, 53 L.Ed.2d 594] [cits]; *Rose v. Lundy*, 455 U.S. 509, 525 n. 2 [102 S.Ct. 1198, 1207 n. 2, 71 L.Ed.2d 379] [cits] (1982) (Blackmun, J., concurring in the judgment).

The case before this Court *does* present the question of "whether a lawyer's omission of a claim from an earlier petition may be excused by a later change in law which could have reasonably been anticipated." *Id.* Furthermore, the state in this case *does* require a petitioner to assert all claims in a single petition. O.C.G.A. § 9-14-51. The state court expressly concluded that "since this claim could have been raised in Petitioner's original habeas corpus petition the Court finds that he has waived the right

to do so in this successive habeas petition." *Moore v. Kemp*, No. 6381 at p. 2 (Sup.Ct. Butts Cty. May 18, 1984) (Respondent's Exh. 2), *certificate of probable cause and of motion for stay of execution denied* (Ga. Supreme Court No. 2875, May 18, 1984) (Respondent's Exh. 3). 1984) (Respondent's Exh. 3).

This Court holds that the analysis of the "new law" claims found in the procedural default cases (*Engle*) constitutes an appropriate basis for evaluation of the *Estelle v. Smith* "new law" claim in this case. Accordingly, the Court turns to *Engle* as well as the recent Sixth Circuit case of *Watters v. Hubbard*, 725 F.2d 381 (6th Cir.1984) for disposition of this issue.

In applying these cases, it becomes readily apparent that this claim must fail when it is compared to the degree to which the state prisoners were held to have possessed the "constitutional tools" to anticipate and argue the "new law" claim rejected in *Engle*. The same conclusion is reached by this Court under *Watters*. In *Watters*, the petitioner argued that the state prosecutor's cross-examination questioning of his court-appointed psychiatrists violated his privilege against self-incrimination. The state argued that Watters failed to make a specific objection as required under Ohio law and that the claim was thus barred under *Engle*.

In denying Watters' claim, the Sixth Circuit concluded that since the case law "by the time of his trial recognized the Fifth Amendment implications inherent in evidence of inculpatory admissions to examining psychiatrists [cits]," the claim was not so "novel" as to constitute cause and that he was not "without the tools to make a

specific objection" until the Supreme Court's holding in *Estelle v. Smith*, 725 F.2d at 383.[2]

This Court emphasizes that to the extent the *Engle*-type cases might represent a higher standard than with other abuse of writ cases, it is undertaken in this case because Petitioner has been represented by counsel at the trial and habeas court stages in this process.[3] Different considerations are present in *pro se* situations. *Jones; Compare Sockwell v. Maggio*, 709 F.2d 341 (5th Cir.1983), cited in *Jones* at 164 (no abuse of writ where *pro se* petitioner alleged *Edwards v. Arizona* claim, since *Edwards* was decided three years after petitioner's previous habeas petition was dismissed in 1978).

B. *The Lockett v. Ohio and Gardner v. Florida Claims*

Petitioner next contends that his sentence was based on a presentence report containing inaccurate information, thus depriving him of his constitutional right to be sentenced based on accurate information and depriving him

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2. Additionally, since Watters called the psychiatrists as his own witnesses and was not interrogated in a custodial setting, no prejudice could be shown. Once "cause" cannot be shown, however, the "prejudice" requirement falls from immediate consideration. The *Engle* court ceased further consideration of the case after it concluded that "because the [state prisoners] have not demonstrated cause for the default, they are barred from asserting that claim under 28 U.S.C. § 2254. . . ." 456 U.S. at 135, 102 S.Ct. at 1575. Thus, the prejudice requirement would not be applicable to abuse of writ considerations.

3. In this context, the Court would find Petitioner's ineffective assistance of counsel argument to be without merit, since he would in effect be asserting that both of his successive habeas counsel were incompetent and that neither Bonner nor Hicks made use of the "constitutional tools."

of a meaningful opportunity to review and correct the information. In Petitioner's Appendix K and L, he asserts that material omissions and false statements were in the presentence report. Ten "convictions" enumerated in the report, for example, were in fact either mere arrests or juvenile court adjudications. Petitioner attests that he did not see the report until two years after the sentencing. He argues that under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (sentencer must consider all mitigating evidence), the sentencing judge failed to rely on a proper record of the mitigating circumstances. Petitioner further asserts that he was denied an opportunity to rebut the contents of his presentence report in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *see also Raulerson v. Wainwright*, 508 F.Supp. 381, 383-85 (M.D.Fla.1980), *on appeal following resentencing*, 732 F.2d 803 (11th Cir.1984).

Respondent urges application of Rule 9(b) to this claim, since the information to which Petitioner refers is not "newly discovered" and any alleged inaccuracies in the presentence report could have been raised, if not before the sentencing court, certainly before the Georgia Supreme Court on direct appeal or before the first state habeas court.

As mentioned above, Petitioner's first federal habeas petition was filed in this Court in 1978. In an amended petition for a writ of habeas corpus filed in 1980 (Petitioner's Appendix "E"), Petitioner's second habeas counsel, H. Diana Hicks, raised additional claims, including: that the sentence of death was based in part on a presentence report which was not disclosed to the Petitioner.

Id., at 7-8. This Court concluded that it could

> see no sound reason for permitting further amendment at this late stage of the present case. As respondent points out, the petitioner here has been represented at all times. Furthermore, counsel made explicit reference to the presentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from Mr. [Hinton R.] Pierce, [Petitioner's trial court counsel,] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that ther eport was turned over to Mr. Pierce, *see* Transcript of July 17, 1978, at 27-28, the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination. Thus, the Court can find no basis for concluding that any sound reason exists to allow new counsel to resurrect this question. Motion to amend with respect to this argument is therefore denied.

513 F.Supp. at 805.

Petitioner argues that the evidence suggests his trial court counsel did not in fact receive the presentence report (*see* Petitioner's Appendix K at 4), and that if he did, he could not have had sufficient time to examine it, especially in light of its voluminousness. Thus, Petitioner maintains that he was denied effective assistance of counsel. *See Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Furthermore, he asserts that his first habeas counsel, James Bonner, was ineffective because he was under the

mistaken belief that since Petitioner had plead guilty, he could not raise this claim in first state habeas petition as a result of *McMann v. Richardson,* 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970) ("a guilty plea connot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded attorneys in criminal cases.'" *Strickland,* — U.S. at —, 104 S.Ct. at 2064). *See* Petitioner's Appendix 1 (Unsworn, unsigned affidavit of James Bonner asserting that he was 1) ignorant of the law, 2) was struggling with an unmanageable caseload at the time, 3) failed to make a factual investigation and 4) refused to accede to Moore's request to raise the ineffective assistance of counsel claim). Thus, Petitioner in effect argues that two attorneys successively rendered him ineffective assistance of counsel, and only when Diana Hicks took responsibility for his case was the claim properly raised.

Laced throughout Petitioner's present set of claims are ineffective assistance of counsel assertions. In *Jones,* the Fifth Circuit noted that "[c]riminal defendants daily entrust their liberty to the skill of their lawyers." 722 F.2d 159. Moreover,

> [a]capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision, *see Barclay v. Florida,* 463 U.S. —, —, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision.
>
> *Washington, at* —, 104 S.Ct. at 2064.

The first state habeas court reproduced the testimony of Petitioner's counsel at the sentencing hearing and considered the Respondent's exhibit showing that a copy of the report was furnished to Petitioner's counsel. The state habeas corpus record further demonstrates that trial court counsel requested a short period of time prior to the hearing in which to review the report's contents and make any comments.

Petitioner emphasizes that because of the magnitude of inaccuracies contained in the report, that "short period" of time was obviously not sufficient for Pierce to glean even the more obvious errors. Pierce was either unable to comprehend the problem or did not take enough time to study the report, or both.

> Judicial scrunity of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that an act or particular omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34 [102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783] (1982).

Washington, at —, 104 S.Ct. at 2065.

The Supreme Court was particularly wary of "[t]he availability of intrusive post-trial inquiry into attorney performance . . . [which] would encourage the proliferation of ineffectiveness challenges." *Id.*

Petitioner in this case has raised sufficient questions for this Court to hesitate, for if attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information. Where the interests of justice so require, such a claim should be entertained. It was a similar hesitation that caused Justice O'Connor in *Eddings* to conclude that "[b]ecause of the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." 455 U.S. 104, 117 n., 102 S.Ct. 869, 878 n., 71 L.Ed.2d 1.

Unlike *Washington*, it is arguable in this case that the corrected information "would [not] barely have altered the sentencing profile presented to the sentencing judge." *Id.*, — U.S. at —, 104 S.Ct. at 2071.

Nevertheless, repeated opportunities to litigate this issue have been provided in this case. Such opportunities include the first state habeas proceeding—despite the Bonner affidavit attesting otherwise—as well as the latest sojourn to the Eleventh Circuit, where that court concluded

> Judge McMillan properly considered all of the evidence in mitigation before exercising his discretion to impose death. The court listened carefully throughout the presentation of mitigating evidence, asking each witness questions, and concluding with each witness by asking whether he had anything further to say. Moore's relatives testified that Moore was a good boy who had never before been in any serious trouble. Moore testified at the sentencing hearing that he shot and killed the victim out of a combination of fright and intoxication. Then, the sentencing judge further noted as additional mitigating circumstances the fact of Moore's truthfulness and cooperation. Furthermore, Judge McMillan made it clear at the sentencing proceeding that he understood and accepted

> the mandate of Georgia law . . . that he had discretion in sentencing.

722 F.2d ~~at~~ 630.

Because Petitioner himself could have raised this claim on direct appeal to the Georgia Supreme Court;[4] because he did raise it in his first state habeas petition, and because he failed to properly present these issues in his federal habeas petition, this Court is warranted under the "abuse of writ" doctrine to deny these claims.

C. *Proffitt v. Wainwright Claim*

Under *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 508, 509, 78 L.Ed.2d 697 (1983), the Eleventh Circuit recognized the specific right accorded a capital defendant to confront witnesses whose statements are used against him. 685 F.2d at 1254. Petitioner argues that 1) there was false and misleading information contained in the presentence report and 2) it was not presented in open court to the extent that the witnesses supplying the information could have been confronted, under oath, and subjected to cross-examination.

Respondent again urges application of Rule 9(b), emphasizing that *Proffitt*, as did *Estelle v. Smith*, *supra*, established no new legal principles, but merely interpreted

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4. Petitioner's Appendix D is his amendment to the first federal habeas petition. That amendment makes clear Petitioner's capabilities as a litigator, as well as the fact that he raised sophisticated claims, but not the incomplete sentence report claim, even though he saw it, according to his affidavit, two years after his sentence was imposed. Petitioner's Appendix J at ¶ 6.

the Sixth Amendment confrontation clause based on *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Petitioner's theory under *Proffitt* is even weaker than his *Smith* claim analyzed supra. This Court's analysis under § II, Part A. of this decision is controlling and thus this claim is denied.

D. *The Zant v. Stephens Claim*

Similarly, *Stephens* created no new constitutional principles helpful to Petitioner's argument that the erroneous presentence report denied him his right to accurate and meaningful appellate review. In *Stephens*, the court held that the limited function served by the jury's finding of a statutory aggravating circumstance does not render Georgia's statutory scheme invalid under the holding of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Fifth Circuit had held that under *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), a jury verdict based on multiple grounds must be set aside if the reviewing court cannot ascertain whether the jury relied on an unconstitutional ground. It also "believed that the presence of the invalid circumstances 'made it possible for the jury to consider several prior convictions which otherwise would not have been before it.'" — U.S. at —, 103 S.Ct. at 2739, 77 L.Ed.2d at 245.

In reversing the Fifth Circuit, the Supreme Court recognized the Georgia Supreme Court's reasoning, wherein that court distinguished *Stromberg* as a case in which a

jury might have relied exclusively on a single invalid ground, noting that the jury in this case had expressly relied on valid and sufficient grounds for its verdict. Since the statutory scheme provided that the jury was required to find at least one aggravating circumstance is writing and that appellate review was mandatory, the limited purpose served by the finding of the statutory aggravating circumstance did not allow a jury unlimited discretion in applying the death penalty.

Petitioner raised on direct appeal (Petitioner's Appendix A at ¶ 5(B)) an issue concerning an insufficient record and raised the issue in his first state habeas brief in the wake of *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *Stephens* does not create a new constitutional right and does not qualify as a "new law" claim in light of *Gregg*. Presentation of this claim at this late date cannot be excused under Rule 9(b).

E. *The Enmund v. Florida Claim*

Under this theory, Petitioner argues that his death sentence is excessive and disproportionate because he did not intend to kill his victim. The issue was factually raised in his first state habeas petition (*See* Petitioner's Appendix A) and the state habeas court found that Petitioner admitted intent to kill. (Petitioner's Appendix B at 7).

The record shows that this claim was exhausted, was presented for this Court's review, and was initially resolved in his favor. *Blake v. Zant*, *supra*, at 818. Rule 9(b) is applicable to this claim, which is also without merit. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

F. *The McCleskey v. Zant Claim*

Moore next argues that he will be executed in an arbitrary and discriminatory manner in violation of the Eighth and Fourteenth Amendments. He is a black man who murdered a black victim and his claim therefore falls within that umbrella of "Baldus Study"[5] cases currently pending before the Eleventh Circuit. *See, e.g., Spencer v. Zant, supra; McCleskey v. Zant, supra,* and *Ross v. Hopper*, 716 F.2d 1528 (11th Cir.1983), *vacated for reh'g en banc*, 729 F.2d 1293 (11th Cir.1984). Under this theory,

> [i]f a petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination against him, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 [97 S.Ct. 555, 50 L.Ed.2d 450] [cits] (1977), either because of his own race or the race of his victim, the federal district court should intervene and review substantially the sentencing decision.

Spinkellink v. Wainwright,[6] 578 F.2d 582 (5th Cir.1978), *reh'g denied*, 441 U.S. 937, 99 S.Ct. 2064, 60 L.Ed.2d 667, *application for stay denied*, 442 U.S. 1301, 99 S.Ct. 2091, 60 L.Ed.2d 649 (1979); *McCleskey v. Zant*, 580 F.Supp. at 347.

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5. Dr. David Baldus, a statistician and social scientist has conducted "a complex scientific study of the administration of Georgia's death penalty, focusing on the issues raised in [*Spencer v. Zant, supra,* and other cases]. 715 F.2d at 1579. Federal habeas petitioners in the above cases seek to use this study to attack the constitutionality of Georgia's death penalty statute.

6. The *Spencer* panel opinion emphasized that *Spinkellink* and *Smith* establish that the merits of an attack on the constitutionality of the death penalty as applied turn on the quality of the evidence presented. 715 F.2d at 1581.

Respondent asserts that Petitioner alleged "arbitrariness and capriciousness" in the Georgia death penalty scheme in both his first state habeas petition and in his first federal habeas petition. However, Petitioner did not raise the claim of discrimination in the imposition of the death penalty which he now seeks to raise in his second federal habeas petition. He is thus raising the "Baldus Study" claim for the first time in this court and thus the claim should be barred. Moreover, Respondent contends, none of the decisions Petitioner cited give him any right to raise the issue at this late date. Finally, he was free to raise empirical study claims in the past, as other state prisoners have done. *See, e.g., McCorquodale v. Balcom*, 525 F.Supp. 408, 429 (N.D.Ga.1981).

Petitioner maintains that he previously raised this issue in substance, but the major statistical studies were not available to him when he filed his first habeas petition. The Court notes a similar set of facts in *Stephens v. Kemp*, 721 F.2d 1300 (11th Cir.1983). In that case, an Eleventh Circuit panel dismissed a similar claim for abuse of writ. "The only excuse tendered by petitioner for his failure previously to present his contentions . . . is the claimed ineffectiveness of his prior counsel both at trial and during the prior habeas corpus proceedings." *Id.*, at 1304. The court rejected the ineffectiveness of counsel claim and held that the district court did not err in failing to grant the relief sought. *Id.*

Subsequently, the *en banc* court met and by an evenly-divided vote, denied the prisoner's request for a rehearing *en banc*. On application for stay, however, the United States Supreme Court granted Stephens' application, pend-

ing the decision in *Spencer*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983).

This Court declines to grant Petitioner a stay on this claim under Rule 9(b). In both his first state and first federal habeas corpus petitions he alleged "arbitrariness and capriciousness" in the administration of the death penalty. He did not raise the "discrimination" claim regarding imposition of the death penalty, however, which he now seeks to raise in a successive petition.

It is clear to this Court that with little more than mere reference to the Baldus Study, Petitioner is attempting to slip in under the *McCleskey-Ross* and *Spencer* umbrella. Under the panel opinion above, the claim is dismissed as an abuse of writ.

G. *Assistance of Counsel*

The Court is troubled by the virtually automatic claim, in habeas petitions, to ineffective assistance of counsel. Since this petition was filed, both habeas counsel have submitted affidavits emphasizing their personal difficulties at the time of the earlier habeas petitions. In addition, the trial court counsel in this case has been attacked as ineffective. Attorneys here turned against themselves as well as each other. Omitted claims are explained away by the incompetence of one or two or all three counsel in this case. The claim itself becomes suspect with each instance of overuse.

In the first petition, this Court found an earlier ineffective assistance of counsel claim to be without merit. *Blake v. Zant*, at 809. Although Petitioner's proposed amendments alleged other instances of ineffective assist-

ance, *see, e.g.*, Petitioner's Appendix (D) (failure to challenge grand jury), no claims were raised concerning ineffective assistance at sentencing. It will not be considered in this successive claim.

H. *Sentencing Judge's Responsibility*

In his motion for declaratory judgment, Petitioner argued that the sentencing judge, relying on the probability of appellate relief, took less than full responsibility for his sentencing decision. The claim, which is suspect on its face, was denied at the state trial court level and on appeal. 239 Ga. 67 (1977). It was not raised in the initial petition before this Court, although it was raised in an amendment. No good reason has been shown why it could not be raised in the first petition and it is thus denied. Additionally, although the claim was not presented to the Eleventh Circuit, its conclusions regarding the sentencing proceeding in the latest panel decision suggests that there is little merit to this claim.

All other claims are DENIED.

To summarize, the application for Stay is DENIED, as is the successive habeas petition. Certification for probable cause to appeal is GRANTED. Finally, Petitioner's motion to proceed *in forma pauperis* is GRANTED.

SO ORDERED, this 22nd day of May, 1984.

/s/ B. Avant Edenfield
Judge, United States District Court
Southern District of Georgia

KRAVITCH, Circuit Judge, dissenting:

By adopting the district court's order, the majority holds that Moore's second habeas petition constitutes an

abuse of the writ and therefore precludes him from litigating his claims in federal court. Under the precedents of the Supreme Court and this circuit, however, at least two of Moore's claims fall outside the scope of the abuse of the writ doctrine.[1] In holding the contrary, the majority expands the abuse of the writ doctrine in an unwarranted manner. I respectfully dissent.

I. *The Abuse of the Writ Doctrine*

In *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1962), the Supreme Court stated that a successive application for habeas relief raising claims not previously raised or, if raised, not adjudicated on the merits may be avoided only if there has been an abuse of the writ. *Id.* at 17, 83 S.Ct. at 1078. It is well settled that a successive petition presenting new claims may not be dismissed as an abuse unless the previous omission of these claims resulted from "(1) the intentional withholding or intentional abandonment of those issues on the initial petition or (2) inexcusable neglect." *Stephens v. Kemp*, 721 F.2d 1300, 1303 (11th Cir.), *granted*, — U.S. —, 104 S.Ct. 562, 78 L.Ed.2d 370 (1983); *see Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981). Similarly, whether a petition presenting claims previously raised, but not adjudicated, constitutes an abuse depends upon whether the petitioner's intentional abandonment or inexcusable neglect precluded the original habeas court from reaching

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1. These claims concern the presentencing report relied upon by the sentencing court. I agree with the majority that Moore's other claims constitute an abuse of the writ.

the merits. Moreover, whether intentional abandonment or inexcusable neglect has occurred "must be tested under equitable principles," *Potts,* 638 F.2d at 743, that is, "the equities of the situation and the conduct of petitioner are relevant to the determination of whether an abuse has occurred," *id.* at 741.

Also important in determining whether there has been an abuse is the underlying purpose of the doctrine. In this regard, the former Fifth Circuit observed, "The principle behind Rule 9(b) is to dismiss those petitions that constitute 'needless piecemeal litigation' or whose 'purpose is to vex, harass, or delay.' " *Haley v. Estelle,* 632 F.2d 1273, 1275 (5th Cir.1980) (quoting *Sanders,* 373 U.S. at 18, 83 S.Ct. at 1078).

Attention to these considerations when applying the already narrow standards articulated above promotes flexibility and ensures that "[t]he 'abuse of the Writ' doctrine is of rare and extraordinary application." *Paprskar v. Estelle,* 612 F.2d 1003, 1007 (5th Cir.), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980). In this case, however, the majority not only extends the applicable standards, but also disregards the relevant equitable considerations. The result is an overly broad and excessively rigid application of the doctrine.

II. *The Claims Raised in the Proposed Amendment to the Original Petition*

In the petition before us, Moore challenges the presentence report on which the sentencing judge relied as containing substantial inaccuracies. Citing *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir.1982), *modified,* 706 F.2d 311, *cert. denied,* — U.S. —, —, 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698 (1983), he argues that he was unconstitutionally denied an adequate opportunity to examine, contest and confront the report. Moore's substitute appointed counsel had attempted to raise these issues in the initial federal petition by way of amendment proffered while the proceeding was pending, seven months prior to the district court's ruling. Moore had raised the claims in his state habeas proceeding, but failed to assert them in the original federal petition. Though granting habeas relief on two other grounds,[2] the district court refused to allow the amendment, and a panel of this court upheld the refusal on Moore's cross appeal as not constituting an abuse of discretion. *Moore v. Balkcom,* 716 F.2d 1511, 1527 (11th Cir.1983), *modified,* 722 F.2d 629.

Moore thus has attempted to challenge the presentencing report twice in federal court: once by amendment to his initial federal petition and again in this his second federal petition. It is undisputed that the matter of alleged inaccuracies in the presentencing report and the constitutional claims arising therefrom have not been decided on the merits by a federal court. Indeed, in the order under review, the district court, while finding that the petition

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2. The district court had granted relief because it found: (1) the death penalty in this case "shocked the conscience" and thus the Georgia Supreme Court had erred in performing its statutory duty to conduct a proportionality review, and (2) the trial court had improperly relied on a non-statutory aggravating circumstance. A panel of this court reversed on both grounds. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir. 1983), *modified,* 722 F.2d 629.

was an abuse of the writ, granted a certificate of probable cause, stating:

> Petitioner in this case has raised a sufficient question for this Court to hesitate, for if Attorney Pierce did fail to scrutinize the report, then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information. Where the interests of justice so require, such a claim should be entertained. It was a similar hesitation that caused Justice O'Connor in *Eddings* to conclude that "[b]ecause of [sic] the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." 455 U.S. 104, 117 n., 102 S.Ct. 869, 878 n., 71 L.E.2d 1.
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> Unlike *Washington*, it is arguable in this case that the corrected information "would [not] barely have altered the sentencing profile presented to the sentencing judge." *Id.*, at —, 104 S.Ct. at 2071.

Given Moore's attempt to amend his initial federal petition while his claims were still pending before the district court and his cross appeal of the denial of leave to amend, I fail to see how Moore's actions can be properly characterized as an abuse of the writ. Viewing, as does the majority, the successive petition as raising the *Gardner* and *Proffitt* claims for the first time in federal court, I conclude that the omission of these claims may not be attributed to intentional withholding or inexcusable neglect, for it is evident that Moore actively sought to have the district court address the claims during the pendency of his first habeas proceeding. In other words, Moore's attempt to amend tends to negate any inference that he deliberately

or inexcusably omitted the claims from his initial submission to the district court.[3]

To the extent that Moore's atempt to amend, albeit unsuccessful, served to present the *Gardner* and *Proffitt* claims to the district court, the successive peition is perhaps best viewed as raising claims previously raised, but not adjudicated on the merits. If so, the crucial issue is whether the district court's failure to reach the merits is directly attributable to Moore's intentional abandonment or inexcusable neglect. Moore gave the district court the opportunity, indeed urged the district court, to decide the claims, but the court declined to do so. The petitioner should not be faulted at this stage for the district court's exercise of its discretion. *See Moore*, 716 F.2d at 1572.

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3. The Ninth Circuit has noted in the context of a petitioner attempting to amend his petition to include an unexhausted claim that, "[the petitioner's] attempt to amend his petition (which negates any inference that [the petitioner] was deliberately withholding the issue) . . . convinces us that [the petitioner] would not be barred by the abuse-of-the-writ doctrine from raising the issue in a subsequent federal habeas petition. . . ." *Powell v. Spalding*, 679 F.2d 163, 165 n. 2 (9th Cir.1982). The Supreme Court is evenly divided over whether unexhausted issues later resubmitted would constitute an abuse of the writ. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 1213 n. *, 71 L.Ed.2d 379 (1982) (Brennan, J., concurring in part and dissenting in part).

This petitioner's attempt to amend presents a far more compeling case for negating an inference of deliberate withholding. Whereas a petitioner in the exhaustion situation under *Lundy* must amend to *withdraw* the unexhausted claims and then later attempt to have them decided in a successive petition, here the petitioner's proffered amendment was for the express purpose of *raising* the issues so that the district court could address all of his claims in one proceeding.

A finding of abuse under these circumstances is inconsistent with equitable principles and the underlying purpose of the doctrine. Except for his failure to include the *Gardner* and *Proffitt* claims in the document which initiated his first habeas proceeding, Moore did all he could to have the claims heard by the first habeas court. Accordingly, this is not an instance of "needless piecemeal litigation" nor is the purpose of the present petition "to vex, harass, or delay." Rather, having sought in vain to have his claims litigated in a single proceeding, Moore now seeks a decision on the merits regarding those claims which the district court earlier refused to address. Because in my view no abuse of the writ has occurred, I would reverse and remand for a decision on the merits.

III. *The New Law Claim*

Moore raises for the first time a claim based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981),[4] alleging that the Probation Officer who compiled the presentencing report violated Moore's fifth amendment rights by not reading him a *Miranda* warning before the interview. The district court dismissed the

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4. Moore also alleges that he has a new law claim based on our decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified* 706 F.2d 311 (1983), *cert. denied*, — U.S. —, — 104 S.Ct. 508, 509, 78 L.Ed.2d 697, 698 (1983). In *Proffitt*, we held that the sixth amendment right of confrontation and cross examination extended to witnesses in capital sentencing proceedings. 685 F.2d at 1251-55. Because part of Moore's argument in his first state habeas proceeding and his attempted amendment was that he was not allowed to examine and contest the presentence report, I would treat this claim as one already raised but not adjudicated, *see supra* Part II.

claim as constituting an abuse of the writ, finding that Moore's failure to raise the claim in his first federal petition was unjustifiable because the holding in *Smith* was a foreseeable development in the law. I am troubled by the majority's endorsement of the district court's analysis for a number of reasons.

First, in reaching its conclusion, the district court by its own admission adopted a new standard for judging whether the omission of a "new law" claim is justifiable. Reasoning that our prior abuse of the writ cases "*may* have had their vitality weakened by recent Supreme Court cases concerning exhaustion," (emphasis added) the court proceeded to hold that new law claims are to be judged by the standard outlined in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), a procedural default case. Hence, the court found the relevant question to be whether "the tools" necessary to anticipate the change in the law were available. The district court also embraced the holding of the recent Fifth Circuit en banc decision in *Jones v. Estelle*, 722 F.2d 159 (5th Cir.1983), which held in part that a petitioner who was represented by counsel is held accountable to a higher standard in justifying the omission of a claim from a prior habeas petition. *Id.* at 167.

However accurate the district court's predictions as to the future validity of our prior abuse of the writ cases it is not for either the district court or this panel to overrule precedent. Such abandonment of prior authority can only be accomplished by this court sitting en banc or by the Supreme Court. Indeed, the Fifth Circuit in *Jones* sat en banc in order to reverse the panel's holding, which had

applied former Fifth Circuit case law in finding that the petitioner's third petition was not an abuse of the writ. Contrary to the established practice in this circuit, a decision which necessitated en banc consideration in *Jones* has been imported into this circuit's law by a district court order and a panel ruling on a motion for an emergency stay of execution.

Moreover, without citing any direct authority from any circuit, the district court in this case took the novel step of applying the *Engle* holding to successive petitions, a step which the *Jones* majority expressly declined to address. 722 F.2d at 159 n. 5. Under the law of this circuit prior to today, a habeas court was not required to engage in an objective inquiry into whether "the basis of a constitutional claim [was] available, and other defense counsel [had] perceived and litigated that claim." *Engle*, 456 U.S. at 134, 102 S.Ct. at 1575. Instead, a subjective inquiry into the petitioner's actual awareness was necessary. As the court in *Haley* stated:

> [I]t is clear that a petitioner cannot be charged with having abused the writ of habeas corpus if, at the time of his earlier petition, he was unaware of the facts on which his newly asserted claims are based, or was unaware that those facts constituted a basis for which federal habeas corpus relief could be granted.

632 F.2d at 1275. By adopting the heightened "cause" standard developed by the *Engle* Court in the procedural default context for evaluating new law claims in successive petitions, the majority significantly modifies our present abuse of the writ case law. Whatever the wisdom of such a drastic step, it is a matter inappropriate for a panel

of this court to decide, especially in a proceeding of an emergency nature.

For the foregoing reasons, I would also remand this claim to the district court with instructions to apply the abuse of the writ standards under existing Eleventh Circuit precedent.

IV. *Conclusion*

Unquestionably, genuine abuses of the writ must be prevented, but we must not adopt measures so broad that legitimate claims will not be heard. I fear that the majority's approach today loses sight of the fact that the doctrine "is not intended to automatically foreclose each petitioner who fails to claim every ground for relief in his first application in federal court." *Haley*, 632 F.2d at 1276.

ON PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting rehearing en banc,

IT IS ORDERED that appellant's motion to recall the mandate is GRANTED, and that appellant's execution,

presently scheduled for June 27, 1984, is STAYED pending rehearing en banc. This cause will be reheard by this Court en banc on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX B

William Neal MOORE,

Petitioner-Appellant,

v.

Walter D. ZANT, Respondent-Appellee.

No. 84-8423.

United States Court of Appeals,
Eleventh Circuit.

June 20, 1984.

Appeal from the United States District
Court for the Southern District of Georgia.

ON PETITION FOR REHEARING EN BANC

(Opinion June 4, 1984, 11th Cir., 1984, 734 F.2d 585).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting rehearing en banc,

IT IS ORDERED that appellant's motion to recall the mandate is GRANTED, and that appellant's execution, presently scheduled for June 27, 1984, is STAYED pending rehearing en banc. This cause will be reheard by this Court en banc on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

William Neal MOORE,

Petitioner-Appellant,

v.

Ralph KEMP, Respondent-Appellee.

No. 84-8423

United States Court of Appeals,
Eleventh Circuit.

July 27, 1987.

John Charles Boger, New York City, for petitioner-appellant.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before RONEY, Chief Judge,

GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

GODBOLD, Circuit Judge:

Petitioner Moore raised in a second federal habeas petition new grounds not raised in his first federal petition and allegedly based upon new principles of law laid down since the first federal petition. The major decision for the en banc court concerns the determination of whether this was an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases.

Moore was convicted of murder in Georgia after a plea of guilty and sentenced to death. He has filed a first state petition for habeas, followed by a first federal petition, a second state petition, and now the second federal petition. In the present case the district court denied all nine grounds asserted on the basis of abuse of the writ. A divided panel of this court affirmed and adopted the district court opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984). Judge Kravitch dissented. 734 F.2d at 601. We set out in the margin a chronology of the key events in this litigation.[1]

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1. 1974: Plea of guilty and sentence; affirmed on merits by Georgia Supreme Court. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975) (per curiam), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

January 1978: First state habeas petition filed. Relief denied July 13, 1978, after evidentiary hearing.

November 22, 1978: Federal habeas petition filed.

March 19, 1979: Habeas counsel moved to withdraw.

April 1979: Petitioner pro se moved to amend to assert several new grounds, including ineffectiveness of counsel.

June 18, 1979: Hearing before magistrate. Petitioner asserted that his attorney referred to conflict between him and Moore on whether ineffective counsel claim should be asserted and magistrate refused to take evidence on issue or to permit petitioner to file an affidavit.

September 30, 1980: New habeas counsel Hicks retained.

October 1, 1980: Motion to amend by new counsel Hicks to add five grounds. State objected to proposed amendments by petitioner and Hicks.

April 8, 1981: Present (third) habeas counsel retained.

April 29, 1981: District court denied relief from conviction, granted writ as to sentence on ground of no proportionality

(Continued on following page)

Five issues are pressed before the en banc court:

(1) The state failed to advise Moore of his right to remain silent or of his right to counsel prior to or during a presentence interview conducted by a probation officer after conviction and before sentencing, a claim based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

(2) The state denied Moore the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report, a claim based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 509, 78 L.Ed.2d 698 (1983).

(3) Neither Moore nor his counsel was afforded adequate opportunity to review the presentence report prior to the sentencing proceeding, in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

(Continued from previous page)

review by Georgia Supreme court. The court also denied both motions to amend (by Moore, *pro se*, and by Hicks). *Blake v. Zant*, 513 F.Supp. 772, 803-18 (S.D.Ga.1981).

1981-1983: Appeal by state to Eleventh Circuit. Moore cross-appealed on refusal to allow his *pro se* amendment. Granting of writ reversed and relief denied on cross-appeal on ground of no abuse of discretion. *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

May 11, 1984: Second state habeas petition filed. Dismissed without hearing. Review denied by Georgia Supreme Court.

May 18, 1984: Second federal habeas petition filed. District court denied relief May 22 on abuse of writ grounds.

June 4, 1984: A panel of the Eleventh Circuit affirmed on district court opinion. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984).

(4) Ineffectiveness of trial counsel at sentencing phase.

(5) Racially discriminatory application of the death penalty in the State of Georgia.[2]

I. The *Estelle v. Smith* claim

In his second state petition, filed in 1984, Moore raised claim (1) of the list above—the failure to advise him of his right to remain silent and of his right to counsel prior to a presentence interview by a probation officer after conviction and before sentencing. The officer interviewed Moore in connection with the preparation of a presentence

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2. The district court also rejected four other grounds for relief in Moore's federal habeas corpus petition:

> 2) Petitioner was sentenced on the basis of materially false and misleading information contained in the presentence report.
>
> . . . .
>
> 5) The presentence report defects prevented petitioner from obtaining a meaningful appellate review in violation of his [sic] Eighth and Fourteenth Amendments.
>
> 6) Petitioner's death sentence is excessive and disproportionate under the Eighth and Fourteenth Amendments since it was imposed despite his repeated and uncontradicted denial of any intent to kill the victim.
>
> . . . .
>
> 9) Since the sentencing judge expressly relied on the prospect of appellate review or the United States Supreme Court's invalidation of Georgia's capital statutes, [he] attached diminished consequences to the sentence of death as imposed and thus took less than full responsibility for the sentencing decision in violation of petitioner's Eighth and Fourteenth Amendment right.

734 F.2d at 589 (district court opinion).

report that was introduced by the state at the sentencing phase of Moore's trial.

This claim was based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which was not decided until three weeks after Moore's first federal petition was decided by the district court.[3] In *Smith* a court ordered the psychiatric examination of Smith, a Texas state prisoner, while he was in custody. Smith was not advised of his right to remain silent when examined by the psychiatrist nor was he told that any statement he made to the psychiatrist could be used against him at the ensuing sentencing hearing. The Supreme Court held that admission of the interrogating doctor's testimony at the sentencing phase of Smith's trial violated his fifth amendment privilege against self-incrimination and his sixth amendment right to counsel as well. Moore seeks to apply *Smith* to the presentence interview conducted of him by a probation officer after his conviction but before his sentencing.

The state court denied the *Smith* claim. First, it held that Moore had previously litigated the issue unsuccessfully. The court did not mean this literally but rather, as its opinion explains, Moore had known the facts concerning his interview by the probation officer and in the first state habeas had raised the issue of opportunity to comment on

3. The district court decision granting relief in *Smith* was decided December 10, 1977, shortly after Moore's first state petition was filed. The Fifth Circuit affirmed September 13, 1979, more than a year after the first federal petition was filed but more than a year before the proposed Hicks amendment was filed. See n. 1, *supra*. The decision by the Supreme Court in *Smith* was entered May 18, 1981, three weeks after the district court ruled on the first federal petition.

and explain the report, and therefore, he could have raised the question of failure to advise him of his right to remain silent and his right to counsel; having failed to do so he had "waived the right to do so in this successive habeas petition." Second, the court held that *Smith* did not establish a new constitutional principle because the Supreme Court had relied on its prior decisions in *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

This issue was then presented in the second federal petition, filed immediately after the second state petition was denied, raising for the first time in the federal court a principle of law alleged to be new and to have been laid down since the first federal petition, and giving rise to an abuse of the writ issue under Rule 9(b). Four days after filing, the district court denied the claim on abuse of the writ grounds.[4] We hold that the *Smith* claim in the second petition was not properly dismissed under Rule 9(b) and remand for reconsideration of this issue on the merits.

Absent deliberate withholding or intentional abandonment of a claim in the first federal petition, the inquiry into whether a petitioner has abused the writ in raising a new law claim must consider the petitioner's conduct and knowledge at the time of the preceding federal applica-

4. It impliedly rejected the state court's statement that Moore had previously litigated the *Smith* claim and proceeded directly to the conclusion that *Smith* was not "new law."

tion.[5] Rule 9(b) allows dismissal of a claim when "the failure of the petitioner to assert those grounds in the prior petition constituted an abuse of the writ." *Accord* 28 U.S.C. § 2244. The focus on petitioner's conduct is mandated by the basic purpose of the abuse of the writ doctrine—to enforce the "equitable principle[ ] . . . that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. U.S.*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963). An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed.[6] *See Haley v. Estelle*, 632 F.2d 1273, 1275 (5th Cir.1980) (a petitioner may assert in a second petition a claim based on facts or legal theories about which he had no knowledge at the time of his prior habeas petition).

Moore was represented by counsel at the time his first habeas corpus petition was filed. He is chargeable with counsel's actual awareness of the factual and legal bases

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5. Of course, the court may not have to consider whether a new law claim on a successive petition is abusive if it determines that the new claim is wholly without merit. The Court in *Sanders* provided that the abuse of the writ rules "are not operative in cases where the second or successive application is shown, on the basis of the application, files and records of the case alone, conclusively to be without merit." *Sanders v. U.S.*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 1963). This policy is incorporated into Rule 4 of the Rules Governing Section 2254 Cases (authorizing summary dismissal "[i]f it plainly appears from the face of and any exhibits annexed to it that the petitioner is not entitled to relief").

6. Awareness of the *factual* basis for a claim at the time of a prior federal habeas petition is a question not before us.

of the claim at the time of the first petition and with the knowledge that would have been possessed by reasonably competent counsel at the time of the first petition. *Cf. Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir.1985) (finding abuse where "[e]ach of the claims that Daniels has asserted in this proceeding is a claim of which competent habeas counsel would have been aware at the time Daniels' prior federal petition was filed in 1980").

We turn next to the state of the law in November 1978 —the time of Moore's first federal petition—with respect to the state's failure to advise Moore of his fifth amendment right to remain silent and of his sixth amendment right to counsel prior to or during the presentence interview conducted by a probation officer after conviction and before sentencing. We hold that in November 1978, two and a half years before *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), reasonably competent counsel preparing the first petition could not reasonably have been expected to foresee the fifth and sixth amendment implications of Moore's presentence interview. In particular, counsel is not chargeable with an anticipation of the potential intersection of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with the sentencing phase of a bifurcated Georgia capital murder trial. As a result, Moore's failure to raise the *Miranda* claim in his first habeas corpus petition was not an abuse of the writ.

The failure of Moore and counsel in 1978 to anticipate the application of *Miranda* in the context of the sentencing phase of Georgia's bifurcated capital proceeding is reasonable in light of the lack of clear guidance in 1978 with

respect to constitutional protections that might attach to the sentencing phase. Georgia's bifurcated death penalty procedure had been approved by the Supreme Court in 1976. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It was not immediately obvious, however, that the constitutional protections normally accorded to a defendant's merits trial would be applied to sentencing phases in general, or Georgia's in particular, much less that *Miranda* might be so applied. In 1982, four years after the 1978 date as of which we are assaying what Moore and his counsel reasonably should have foreseen, the Eleventh Circuit noted that "[t]raditionally, sentencing hearings have not been accorded the significance of the guilt-determination portion of the trial." *Proffitt v. Wainwright*, 685 F.2d 1227, 1252 (11th Cir.1982), *modified* 706 F.2d 311, *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983). This court went on to say in *Proffitt* that in light of recent Supreme Court decisions, "[t]he view, *once prevalent*, that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions . . . is no longer valid." *Id.* at 1253 (emphasis added).[7]

Further evidence of a lack of clear guidance in 1978 with respect to sentencing phases is revealed by looking at the cases on which the Supreme Court relied in its opinion in *Estelle v. Smith*. The Court, in 1981, cited three cases in support of the application of certain constitutional guarantees to the Texas penalty phase: *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); and *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). Of these, *Presnell* (decided November 6, 1978) and *Green* (decided May 29, 1979) were handed down by the Supreme Court after Moore's first federal habeas petition was filed in 1978. The statement in *Gardner*, a year before Moore's first federal petition, that "the sentencing process, as well as the trial itself, must satisfy the Due Process Clause" appears in a plurality opinion of three justices. 430 U.S. at 358, 97 S.Ct. at 1204. The concurring opinions do not clearly ascribe to this position. *See id.* at 364, 97 S.Ct. at 1207 (White, J., concurring) ("I see no reason to address in this case the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered in this case.")[8]

7. See Part II, *infra*, for a discussion of Moore's *Proffitt* claim.

When Moore filed his first federal petition, therefore, the extent to which constitutional protections for criminal defendants would apply to capital sentencing proceedings was not clear—the full panoply of protections, or less than the full array, and if less, what was to be included? *Cf. Proffitt*, in *1982*: "[a]lthough the [Supreme] Court has held capital sentencing proceedings must meet certain procedural requirements, it *has not yet delineated* the exact scope of constitutional procedural protection to which capital defendants are entitled." 685 F.2d at 1253 (emphasis added). In 1980, two years after Moore filed his first petition, the State of Texas was arguing before the United

8. The other concurrences did not consider the issue.

States Supreme Court in *Smith* that Smith "was not entitled to the protection of the Fifth Amendment because [the] testimony was used only to determine punishment after conviction, not to establish guilt" and that "the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial." *Smith*, 451 U.S. at 462, 101 S.Ct. at 1872.

Next, we analyze the decision in *Smith* with particularity, to see what light it sheds on the question of the foreseeability to counsel in 1978 of the possibility that *Miranda* would have plenary applicability to the sentencing phase of a Georgia-type capital murder trial. In *Smith* the Court found a violation of Smith's fifth and sixth amendment rights where the State of Texas introduced, at the sentencing phase of his capital murder trial, the testimony of a psychiatrist who, pursuant to court order, had interviewed him to determine his competency to stand trial. The Court held that in light of *Miranda* the psychiatrist's testimony could not be used at the sentencing phase because Smith had not been given *Miranda* warnings. In *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982) the Fifth Circuit spoke to whether Gray's counsel should have foreseen the circuit's own opinion in *Smith* (handed down in 1979, a year and a half before the Supreme Court decided *Smith*): "Because our opinion in *Smith* was delivered three years after Gray's trial, we do not fault Gray's counsel for not anticipating our holding."[9]

Analysis of why Moore and his first habeas counsel, in 1978, could not reasonably have been expected to antici-

9. The Fifth Circuit's opinion in *Smith* could not have given Moore's counsel any guidance, for it came a year after Moore's first federal petition.

pate a *Smith* type[10] claim requires understanding the importance to the *Smith* decision of the special nature of a Texas sentencing proceeding in a bifurcated capital trial.[11] This is seen in the Fifth Circuit's analysis of *Smith* in *Battie v. Estelle*, 655 F.2d 692 (5th Cir. Sept. 11, 1981), a decision binding on our court. In connection with the issue of the applicability of *Miranda* to the sentencing phase of the trial in *Smith*,[12] *Battie* said:

10. Because we hold that Moore's counsel is not chargeable with an awareness of the *Smith* principle, we need not decide whether he would also have been expected to discern the possible application of the *Smith* principle to investigations conducted by a probation officer, who is in a sense a representative of and officer of the court, having a specialized function in the processes of the court, instead of a psychiatrist, who has a different function but is not an arm of the court itself.

11. It is by no means clear, even now, that *Smith* would apply in non-capital cases where a trial judge has wide discretion to consider information in imposing sentence. *See Baumann v. U.S.* 692 F.2d 565, 576 (9th Cir.1982) (distinguishing *Smith* as involving a bifurcated death proceeding where discretion on sentencing is channelled whereas *Baumann* involved a "routine presentence interview[] conducted for the benefit of a district judge in the exercise of his substantial discretion at sentencing").

12. *Battie* also considered a different aspect of the relationship of *Smith* to the state of the law before *Smith* was announced. The Fifth Circuit held that the ruling of *Smith* that the pretrial psychiatric competency examination was an official custodial interrogation of the type protected by *Miranda* would apply retroactively because it did not announce a new principle of constitutional law. This does not speak to the issue before us, namely whether the intersection in *Smith* of *Miranda* and capital sentencing proceedings conducted under the Georgia statutory scheme should have been anticipated by counsel in 1978.

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> *Smith* only held the fifth amendment privilege applicable to the sentencing stage of a capital trial in Texas because the State of Texas must prove a capital defendant's future dangerousness as an issue separate and distinct from proof of his guilt. The applicability of the privilege to mandatory or discretionary sentencing procedures not requiring proof of such an additional prerequisite to impose a criminal punishment raises different questions not necessarily resolved by *Smith*.

655 F.2d at 698 n. 10. The Georgia statute under which Moore was sentenced requires only consideration of aggravating and mitigating circumstances and does not require any proof of future dangerousness. *See* O.C.G.A. § 17-10-30. It would be anomalous for us to charge Moore's counsel with an awareness in 1978 of a proposition that remained unclear to the Fifth Circuit almost three years later (and four months after it had the benefit of *Smith*),

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The Eleventh Circuit has pointed out that a determination of the retroactivity of a decision is a different inquiry than the question of what counsel should have foreseen before the decision was handed down. In *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir.), *cert. denied*, 469 U.S. 956, 105 S.Ct. 355, 83 L.Ed.2d 291 (1984), the court observed that different answers could be given to the questions of whether *Smith* applied retroactively and whether counsel should have anticipated *Smith*. The court contrasted *Battie* with the holding of the new Fifth Circuit in *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir.1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983) that counsel was not deficient in failing to anticipate *Smith*. *Alvord*, 725 F.2d at 1293. *See also Francois v. Wainwright*, 741 F.2d 1275, 1285 (11th Cir.1984) (the failure to raise an issue that only later gains judicial recognition does not render counsel ineffective); *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir.), *cert. denied*, 464 U.S. 922, 104 S.Ct. 290, 78 L.Ed.2d 266 (1983) (same).

namely that *Miranda* protections would be applicable to the sentencing phase of a Georgia-type death penalty proceeding.

The Supreme Court has told us that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *accord Smith v. Murray*, 477 U.S. 527, —, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986). An attorney's failure in 1978 to recognize the potential intersection of *Miranda* and Georgia capital sentencing proceedings, does not cause his performance to fall outside of "the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, we cannot charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and therefore hold that his conduct in omitting the claim was an not abuse of the writ warranting dismissal under Rule 9(b). Absent such an abuse of the remedy, the federal courts should hear the merits of the claim on habeas corpus. Accordingly we remand to the district court for a consideration of the merits of Moore's claim regarding his presentence interview.

II. *Proffitt v. Wainwright* claim

In Moore's second habeas petition he raised another "new law" claim. He alleged that the state denied him the right to confront and cross-examine witnesses whose hearsay testimony was considered in the presentence report. This claim is based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982); *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 509, 78 L.Ed.2d 698

(1983), which was decided by the Eleventh Circuit on September 10, 1982, five months after the district court decided the first federal petition. In *Proffitt* this court recognized the specific constitutional right accorded a capital defendant to cross-examine a psychiatrist whose report of a presentence examination of the defendant was considered by the trial court in its sentencing decision. *Id.* at 1251-55. Moore seeks to apply this case to witnesses whose statements were included in his presentence report.

The state habeas court denied the claim, holding that there was no new factual basis for the claim and that *Proffitt* did not establish a new constitutional principle because the Eleventh Circuit had relied "on the landmark decisions of the Supreme Court of the United States in *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965) and *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)." In this second federal habeas petition the district court repected the *Proffitt* claim under the same abuse analysis that it applied to the *Estelle v. Smith* claim. As with the *Smith* claim, we cannot charge Moore with the knowledge of the legal basis of this claim at the time of his first petition and we hold that his conduct in omitting the claim was not an abuse of the writ.

The new law aspect of *Proffitt* arises from the court's resolution of the question of "[w]hether the right to cross-examine adverse witnesses extends to capital sentencing proceedings." 685 F.2d at 1253. The court extended the cross-examination principles of *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26

L.Ed.2d 489 (1970); *Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965) to the penalty phase of capital proceedings. As we concluded with respect to the *Estelle v. Smith* claim, the failure of Moore and his counsel in 1978 to anticipate this extension does not render the omission of the claim from the first petition an abuse of the writ. Accordingly we reverse the district court's dismissal of the *Proffitt* claim on abuse grounds and remand for reconsideration of the merits of the claim.

III. The Gardner v. Florida claim

The second federal petition alleged that neither Moore nor his counsel had been given a meaningful opportunity to review, correct, or supplement the presentence report, in violation of *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *Gardner* was decided in 1977; therefore this is not claim based on alleged "new law" declared since the first federal petition.

This claim comes to us with an unusual procedural history. It was originally raised in Moore's first state habeas corpus petition in 1978. The first federal petition, filed in the fall of 1978, did not include this claim. Moore sought to raise the claim by amendment to the petition in October 1980, just after he retained new counsel. The district court refused to grant leave to amend the petition, and the Eleventh Circuit affirmed:

> The district court found that petitioner had been represented by counsel at all times. Counsel explicitly referred to this issue in the original habeas petition filed approximately two years before the proposed amendment. We cannot say that the district court abused its discretion in denying the proposed amend-

> ment in this case where counsel apparently considered and rejected the proposed argument two years before filing the proposed amendment.[15]

716 F.2d at 1527 & n. 15. Moore raised the issue again in his second federal petition, and the district court denied the claim as an abuse of the writ. 734 F.2d at 598 (district court opinion).

Rule 9(b) creates two categories of claims in second (or successive) habeas petitions. The first prong concerns cases in which the same ground has previously been presented and decided against petitioner in a prior determination on the merits. Moore's claim of inadequate opportunity to review the presentence report was never determined on the merits. It is therefore a second prong, or new, claim that must be entertained on the merits unless the failure to raise it in the first petition was an abuse of the writ.

Moore argues that the failure to raise this claim in the first petition cannot be an abuse of the writ in light of Moore's attempt to add the claim by amendment. Although Moore did attempt to raise this claim before the first federal habeas court, the procedural insufficiency of that attempt has already been litigated, before that court on a motion to amend the petition and before this court on Moore's cross-appeal of the denial of the motion to amend.

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[15]Mr. James C. Bonner who had represented petitioner at the prior state habeas petition, filed the initial habeas petition in federal court. At the time the proposed amendment was filed, Ms. H. Diana Hicks represented Moore. Since Moore was represented at all time by counsel, though not by the same individual, we cannot say that the district court abused its discretion in refusing to allow the amendment. . . .

716 F.2d at 1527. We are thus called upon to determine the effect on a second federal habeas corpus petition of a failure to raise a claim adequately on the first petition. On the one hand, the denial of leave to amend cannot stand as a conclusive determination that the failure to raise the claim in the first petition was an abuse of the writ, because the standards applied by a district court in considering amendment are coterminous with the standards for abuse of the writ. *Cf. Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980) (dismissal of unexhausted claims in first petition does not bar as an abuse the assertion of those claims on a second petition). On the other hand, the mere attempt to raise the claim by amendment in one habeas proceeding cannot by itself be a defense to an assertion of abuse in a subsequent proceeding. It would be anomalous if a petitioner who deliberately and strategically withheld a claim from his petition, *cf. Young v. Kemp,* 758 F.2d 514, 516 (11th Cir.1985), could insulate that conduct from a later abuse determination by the simple expedient of an untimely attempt to amend the first petition. This result would frustrate Rule 9(b)'s goal of having all claims raised and determined in one petition.

The fact that Moore's *Gardner* claim was included in a proposed amendment to a first petition and that the amendment was properly denied is at most a factor to be considered in answering the question of whether that claim may be denied in this petition on abuse of the writ grounds. The appropriate inquiry in the subsequent action is whether the failure to bring the claim properly in the first action constituted an abuse of the writ.

We cannot say that the district court, in ruling on Moore's second petition, erred in finding that the failure to include this claim in the first petition was an abuse of the writ.[13] Moore raised the claim in his first state habeas petition, *see* 734 F.2d at 597 (district court opinion), and his original federal habeas petition made explicit reference to the presentence report issue. *See Moore v. Balkcom*, 716 F.2d 1511, 1527 (11th Cir.1983). He failed even to attempt to raise the claim for almost two years after the first petition was filed. This extended failure to raise a claim previously raised in the state courts in analogous to the situation in *Antone v. Dugger*, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984) (per curiam). In that case the Supreme Court upheld a finding of abuse where the "applicant had presented each of these claims to the state courts before the first petition for habeas was filed (and, indeed, the substance of these claims may have been presented in the first habeas petition) . . . ." *Id.*, at 206, 104 S.Ct. at 965.

Even where abuse is found, however, a federal court should not dismiss, under Rule 9, a claim in a successive petition if the "ends of justice" require consideration of the claim on the merits. *See Potts v. Zant*, 638 F.2d 727, 751-52 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877, 102

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13. The district court stated that

> Because Petitioner himself could have raised the claim on direct appeal to the Georgia Supreme Court, because he did raise it in his first state habeas petition, and because he failed to properly present the issues in his federal petition, this Court is warranted under the "abuse of the writ" doctrine to deny [this] claim.

734 F.2d at 598 (district court opinion).

S.Ct. 357, 70 L.Ed.2d 187 (1981); *Sanders v. U.S.*, 373 U.S. 1, 18-19, 83 S.Ct. 1068, 1078-79, 10 L.Ed.2d 148 (1963). The district court in *Moore* acknowledged this principle, noting that "[w]here the interests of justice so require, such a claim should be entertained," 734 F.2d at 597. The court apparently concluded, however, that the ends of justice did not require a consideration of Moore's *Gardner* claim on the merits because petitioner had had "repeated opportunities to litigate this issue." *Id.*

It is not certain what standards should guide a district court in determining whether the "ends of justice" require the consideration on the merits of an otherwise dismissable successive habeas petition. In *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986), a four-justice plurality of the Supreme Court suggested that the ends of justice will demand consideration of the merits of claims only where there is "a colorable showing of factual innocence." *Id.* at 2627. We need not decide at this time whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception. We merely hold that, at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence.

Some adjustment is required to apply this test, phrased as it is in terms of "innocence," to alleged constitutional errors in capital sentencing. We find some guidance in the Supreme Court's opinion in *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). In the context of alleged errors in a capital sentencing proceeding the Court in that cases ought to apply an analogous standard—that governing when fundamental principles of

justice would require the consideration of procedurally defaulted claims in the absence of a showing of cause for the default. The standard was announced in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) which held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.* at 2650.

The *Smith v. Murray* Court refused to consider a claim on the merits, finding that "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming [error in the allowance of certain testimony], its admission did not serve to pervert the jury's deliberations concerning whether *in fact* petitioner constituted a continuing threat to society." 106 S.Ct. at 2668.

The district court in the present case did not have available to it the guidance given by the Supreme Court in *Smith v. Murray*. In our consideration of whether "the alleged constitutional error [either] precluded the development of true facts [or] resulted in the admission of false ones" we are faced with a fundamental inconsistency in the decision of the district court. The court found that the ends of justice did not require consideration of the *Gardner* claim on the merits. Yet its own statements arguably require the opposite finding. The court stated that if there had been a *Gardner* violation, "then sufficient likelihood would exist for finding that a wrongful sentence was imposed based on inadequate information." The court also found that "it is arguable that the corrected information

'would [not] barely have altered the sentencing profile presented to the sentencing judge,'" that is, that corrected information would have materially altered the profile before the judge. 734 F.2d at 597 (*quoting Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under these circumstances we vacate the denial of the *Gardner* claim and remand in order that the district court can give fresh consideration to whether the ends of justice require it to consider the merits of this claim.

IV. Ineffectiveness of trial counsel

Moore's second federal habeas petition alleges that his trial attorney rendered ineffective assistance at the sentencing phase of his trial. By a *pro se* motion to amend his first habeas petition, Moore attempted to raise the issue of ineffectiveness of counsel at the merits trial in numerous respects, set out in the margin.[14] The only reference to the sentencing phase concerned failure to transcribe petitioner's arguments concerning punishment and mitigation and aggravating circumstances.

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14. (1) Counsel's failure to investigate and challenge the composition of the grand jury; (2) failure to inform petitioner that he could challenge the composition of the grand jury; (3) failure to investigate prejudice in the county of trial and to seek a change of venue; (4) failure to request that the district attorney's closing arguments be transcribed; (5) use by the Georgia Supreme Court of unconstitutional cases in its appellate review; and (6) failure to follow up on investigation of the offense.

As with the proposed Hicks amendment discussed in the previous section, the first federal habeas court denied the motion to amend. See 513 F.Supp. at 806.

In the second federal petition Moore alleged ineffective counsel at sentencing, on numerous grounds. Moore urges that he did not withhold the issue, stating that it was omitted from the first federal petition because of differences between him and his counsel. The ineffectiveness issue, including the performance of counsel at the sentencing phase, had been examined in detail in the order denying the first state petition. Ineffectiveness at sentencing was not asserted in petitioner's *pro se* amendment or in the Hicks amendment. The court did not err in finding that it was barred under abuse of the writ principles.

V. Racially discriminatory application of death penalty in Georgia

This claim was not raised in the first state petition or the first federal petition. Petitioner has sought the benefit of the Baldus study. The district court held it was barred on abuse grounds. We do not examine this in detail because the Baldus study was rejected in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

AFFIRMED in part, REVERSED in part and REMANDED.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part, in which VANCE, Circuit Judge, joins:

This case comes before the en banc court as an appeal from the district court's decision to deny petitioner, William Neal Moore, a writ of habeas corpus. As the majority opinion notes, the principal issue before the court is whether the district court properly rejected Moore's petition as an abuse of the writ under Rule 9(b) of the Rules Governing Section 2254 Cases, *see* 28 U.S.C. § 2254 (1982). The

majority holds that Moore's failure to present his claims based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), did not constitute an abuse of the writ, because *Estelle v. Smith* and *Proffitt* are "new law." I respectfully dissent from these conclusions because a reasonably competent habeas attorney should have anticipated the holdings of *Estelle v. Smith* and *Proffitt*. I also dissent from the majority's disposition of petitioner's claim under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality), because Moore had a sufficient opportunity to present this claim in his first petition and because it is patently without merit. Finally, I concur in the majority's analysis and disposition of petitioner's remaining claims.[1]

I.

On May 13, 1974, a grand jury in Jefferson County, Georgia, indicted Moore for the April 2, 1974 malice murder and armed robbery of Fredger Stapleton.[2] On June

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1. Petitioner's remaining claims concern the ineffectiveness of trial counsel during the sentencing phase of his case and the alleged racially discriminatory application of the death penalty in Georgia. The district court dismissed both of these claims as an abuse of the writ.

2. The facts underlying this case have been recounted elsewhere. *See, e.g., Blake v. Zant*, 513 F.Supp. 772, 803-04 (S.D. Ga.1981), *aff'd in part and rev'd in part sub nom. Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.1983), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829, 830-31 (1975), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976).

4, 1974, Moore was arraigned in the Superior Court of Jefferson County and pled guilty to both charges. Because the State sought the death penalty on the malice murder charge, Moore was entitled, under Georgia law, to have a jury determine whether that penalty, or a sentence of life imprisonment, should be imposed. He waived his right to a jury determination, electing instead to be sentenced by the court.

On July 17, 1974, the court held a bench trial on the penalty issue. From the evidence adduced by the prosecution and the defense (including a presentence report, prepared by the court's probation officer which the prosecutor had introduced into evidence without objection) the court found that Moore had committed the Stapleton murder during the course of an armed robbery, an aggravating circumstance that rendered Moore subject to the death penalty.[3] The court further found that this aggravating circumstance outweighed the mitigating circumstances present in the case, and it sentenced Moore to death.

On direct appeal, the Supreme Court of Georgia affirmed Moore's conviction and sentence. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975) (per curiam), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1218 (1976). Moore thereafter moved the Superior Court of Jefferson County for a new sentencing proceeding. The court denied his motion. *See Moore v. State*, 239 Ga. 67, 235 S.E.2d 519, *cert. denied*, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 159

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3. See Ga.Code Ann. § 27-2534.1(b)(2) (Harrison 1978); see also *infra* note 21.

(1977).[4] In early 1978, Moore petitioned the Superior Court of Tattnall County, Georgia, for a writ of habeas corpus, presenting six grounds for relief.[5] After an evidentiary hearing, that court rejected his petition, and the Supreme Court of Georgia refused to grant him a certificate of probable cause to appeal.

On November 22, 1978, Moore sought a writ of habeas corpus in the United States District Court for the South-

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4. Moore contended that he was entitled to a new sentencing proceeding on two grounds: (1) the court had imposed the death penalty under "a mistaken belief that such sentence would never be upheld by the U.S. Supreme Court," and (2) the court, in deciding to impose the death penalty, had relied on information (contained in the probation officer's presentence report) which Moore "had no opportunity to deny or explain" (the *Gardner* claim). *See Moore v. State*, 235 S.E.2d at 519. The Supreme Court of Georgia affirmed the trial court's denial of Moore's motion for a new sentencing proceeding on the ground that a habeas corpus action was the sole avenue for such relief. *Id.*

5. In his habeas petition, Moore claimed that his conviction and sentence violated the eighth amendment proscription against cruel and unusual punishment and the due process clause of the fourteenth amendment for the following reasons: (1) his prior arrest record was presented to the sentencing judge in a presentence report "without the Petitioner or his counsel being afforded a fair opportunity to explain or rebut it" (the *Gardner* claim); (2) his direct appeal to the Supreme Court of Georgia was not properly conducted, because the prosecutor's arguments at the close of the sentencing proceeding were not transcribed and included in the record on appeal; (3) a brutal murder of an elderly couple in rural Jefferson County that occurred shortly before Moore was indicted improperly influenced the district attorney and the trial judge in Moore's case; (4) his guilty plea to malice murder was involuntary and unintelligent because he lacked specific intent to kill his victim; (5) his sentence was disproportionate, given the mitigating circumstances present in his case; and (6) he never voluntarily waived his absolute right under Georgia law, see Ga. Code Ann. § 27-1404 (1933) (current version at Ga. Code Ann. § 17-7-93 (1982)), to withdraw his two guilty pleas prior to the court's entry of judgment against him.

ern District of Georgia.[6] His petition contained four of the six claims he had asserted in his state habeas petition;[7] one of the claims Moore omitted was his *Gardner* claim—that his trial judge did not give him and his attorney an adequate opportunity to review, supplement, or correct the probation officer's presentence report before sentencing him to death. On March 6, 1979, while his petition was pending in the district court, Moore filed a pro se motion to amend his petition to add two claims not pertinent to this appeal.[8]

Moore's attorney, James C. Bonner, Jr., who had represented Moore in the state habeas court, thereafter requested and received leave to withdraw, and the district court appointed H. Diana Hicks as substitute counsel. Hicks immediately moved the court for leave to amend Moore's

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6. The discussion in the text omits reference to a federal habeas petition that Moore filed earlier in 1978 and then voluntarily dismissed without prejudice after the Supreme Court of Georgia granted a stay of his execution. That aborted petition has no relevance to this appeal.

7. Moore's federal petition contained claims two, four, five, and six of his state habeas petition. *See supra* note 5. Although his federal petition recited the facts underpinning claim one of his state habeas petition (the *Gardner* claim), it did not present that claim as a ground for relief.

8. Moore's pro se amendment alleged that his trial attorney provided him ineffective assistance of counsel because he (1) failed to investigate and challenge the composition of Moore's grand jury; (2) failed to inform Moore that he could challenge the grand jury; (3) failed to seek a change of venue for Moore's trial; and (4) failed to request that counsel's closing arguments to the sentencing judge be transcribed for review on appeal. Moore also alleged that the Supreme Court of Georgia relied on "[u]nconstitutional cases . . . in compar-i[ng his] death sentence [to prior cases]."

petition, to present his *Gardner* claim.[9] On April 29, 1981, the district court denied both the pro se motion and the Hicks motion for leave to amend, *see Blake v. Zant*, 513 F.Supp. 772, 804-06 (S.D.Ga.1981); granted the writ as to Moore's sentence on the ground that "the penalty of death is cruel and unusual as applied to him in light of the circumstances of the crime and other relevant factors," *id.* at 803; and denied all of Moore's remaining claims, *id.*

The State appealed the district court's judgment granting the writ as to Moore's sentence, and Moore cross-appealed, challenging the district court's rulings on the claims that the district court rejected and the court's refusal to permit him to amend his petition. A panel of this court reversed the grant of relief, concluding that the district court had improperly engaged in a proportionality review of Moore's sentence, *Moore v. Balkcom*, 716 F.2d 1511, 1518-19 (11th Cir.1983) (on rehearing), and affirmed the district court's rejection of his remaining challenges to his guilty pleas and death sentence, *id.* at 1527. The panel also held that the district court did not abuse its discretion in refusing to grant Moore leave to amend his petition. *Id.* The Supreme Court denied Moore's petition for a writ of certiorari. *Moore v. Balkcom*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984).

Moore thereafter returned to state court for relief, seeking a writ of habeas corpus in the Superior Court of Butts County, Georgia. His petition contained seven claims. Moore alleged that (1) the State infringed his rights under the fifth, sixth, and fourteenth amendments

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9. Hicks' proposed amendment, which was filed on October 1, 1980, included still other claims not relevant to this appeal.

when his trial judge, in deciding whether to impose the death sentence, relied on a presentence report that contained information the court's probation officer had obtained from Moore without advising him of his rights not to submit to a presentence interview and to have counsel present during the interview (the *Estelle v. Smith* claim);[10] (2) the presentence report contained inaccurate and incomplete information, in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S.104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); (3) he was denied his sixth and fourteenth amendment rights to confront the witnesses whose testimony was contained in the presentence report (the *Proffitt* claim); (4) because of the errors and ommissions contained in the presentence report, he was denied the right to meaningful appellate review, in violation of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); (5) because he lacked the specific intent to kill his victim, he was sentenced to death in violation of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); (6) the death penalty in Georgia was being administered in a racially discriminatory manner; and (7) his trial counsel provided him ineffective assistance during the sentencing phase of his case. The superior court rejected each of Moore's claims. The court rejected the *Enmund* and ineffective assistance of counsel claims because they had been fully litigated in Moore's first state habeas proceed-

10. The *Estelle v. Smith* claim actually consists of two claims, one based on the fifth and fourteenth amendments and another based on the sixth and fourteenth amendments. Throughout this opinion, I frequently refer to these claims as the *Estelle v. Smith* claim and, for convenience, omit reference to the fourteenth amendment.

ing and Moore gave no reason why they should be relitigated. The court held that Moore had waived his remaining claims by failing to raise them during that first proceeding. *See* Ga.Code Ann. § 9-14-51 (1982). On May 18, 1984, the Supreme Court of Georgia denied Moore's application for a certificate of probabie cause to appeal.

Moore then filed his second federal habeas petition, the one now before us, presenting the seven claims he asserted in his second state habeas petition. Moore alleged that these claims were based on newly discovered facts (the sixth claim) or novel legal principles (the six remaining claims) that were not available when he brought his first federal habeas petition. Moore also presented his *Gardner* claim, which he had raised in his previous federal habeas proceeding in a motion for leave to amend his petition.

On May 22, 1984, the district court entered a memorandum order dismissing Moore's petition and denying a certificate of probable cause. Except for the *Enmund* claim,[11] the court held that the delayed presentation of Moore's claims constituted an abuse of the writ; contrary to Moore's contention, they were neither based on newly discovered facts nor on new constitutional doctrine, and he gave no lawful reason why he should not have asserted them in his previous petition. Adopting the district court's memorandum order in full, a divided panel of this court affirmed the decision. *Moore v. Zant*, 734 F.2d 585 (11th Cir.1984) (per curiam).

11. The district court, observing that it had rejected the *Enmund* claim on the merits in Moore's previous federal habeas proceeding, held that the claim was meritless and that the ends of justice did not require its relitigation.

II.

The doors of the federal courts must always remain open to state prisoners seeking to bring constitutional challenges to the propriety of their confinement. *See Sanders v. United States*, 373 U.S. 1, 7-8, 83 S.Ct. 1068, 1072-73, 10 L.Ed.2d 148 (1963); *cf. Fay v. Noia*, 372 U.S. 391, 402, 83 S.Ct. 822, 829, 9 L.Ed.2d 837 (1963) ("[G]overnment must always be accountable to the judiciary for a man's imprisonment. . . ."). For this reason, the doctrine of res judicata does not apply to bar successive petitions for habeas corpus relief. *Sanders*, 373 U.S. at 7, 83 S.Ct. at 1072.[12] Habeas corpus is, however, grounded in principles

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12. Even though the federal courts may have previously rejected the petitioner's claim on the merits, a habeas judge will entertain it if the petitioner establishes that the ends of justice would be served by relitigation of the claim. *Sanders*, 373 U.S. at 16, 83 S.Ct. at 1078. The *Sanders* Court elaborated on this "ends of justice" test as follows:

> If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior application was not full and fair. . . . If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First*, the foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized. *Second*, the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

Id. at 16-17, 83 S.Ct. at 1078 (citation omitted). For further discussion of the standard applicable to successive petitions, see *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Although *Sanders* involved habeas corpus relief for federal prisoners, its standards apply to habeas corpus cases brought by state prisoners.

of equity. Accordingly, in deciding whether to entertain the merits of a claim contained in a successive petition, the court must consider the diligence with which the petitioner has pursued the claim. Depending upon the circumstances, a petitioner's lack of diligence may operate as a bar to relief. *Id.* at 17, 83 S.Ct. at 1078 ("'[A] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'") (citation omitted).

The Supreme Court expounded upon this equitable principle in *Sanders* and articulated the standard a trial judge should apply in deciding whether to consider the merits of a claim that the petitioner failed to prosecute in an earlier habeas proceeding. The judge must consider the "new" claim on the merits, unless the petitioner's delay in presenting it constitutes an abuse of the writ. *Id.* at 17, 83 S.Ct. at 1078. For example, the court may deem the petitioner to have waived the claim if, after raising it in a prior habeas petition, he abandoned the claim during his prosecution of that petition. Similarly, it may hold that the petitioner waived the claim if he deliberately withheld it from his prior petition with the expectation of presenting it in a subsequent petition. *Id.* at 18, 83 S.Ct. at 1078. As the Court noted in *Sanders*, these equitable bars to prosecution are unexceptionable because "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Id.* at 18, 83 S.Ct. at 1078.[13]

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13. Congress codified the general principles of *Sanders* in Rule 9(b) of the Rules Governing Section 2254 Cases (hereinafter

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A petitioner may also be denied relief even though he did not deliberately bypass an opportunity to litigate his claim in the prior habeas proceeding. The court may refuse to litigate his claim on the merits if it finds that his failure to raise it in the prior proceeding was the result of "inexcusable neglect."[14] *See Paprskar v. Estelle*, 612

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Rule 9(b)), *see* 28 U.S.C. § 2254 (1982); *see also* 28 U.S.C. § 2244(b) (1982). Rule 9(b) provides as follows:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

The initial burden of pleading an abuse of the writ under Rule 9(b) rests on the state, *see Sanders*, 373 U.S. at 17, 83 S.Ct. at 1078; *Price v. Johnston*, 334 U.S. 266, 292, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948), although a district court may raise the issue *sua sponte*, *see Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir.1983) (en banc), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984). Once the abuse of the writ issue has been raised, the petitioner "has the burden of answering that allegation and of proving that he has not abused the writ." *Price*, 334 U.S. at 292, 68 S.Ct. at 1063; *see also Funchess v. Wainwright*, 788 F.2d 1443, 1445 (11th Cir.1986) (per curiam); *Jones v. Estelle*, 722 F.2d at 164. As the Supreme Court noted in *Sanders*, "[t]he principles [for determining an abuse of the writ] are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." *Sanders*, 373 U.S. at 18, 83 S.Ct. at 1079; *see also Jones v. Estelle*, 722 F.2d at 165.

14. Equity has never countenanced contumacious conduct. Thus, a federal court will not entertain a claim that the petitioner deliberately withheld—or, if asserted, deliberately withdrew—with the idea of bringing it later if his attempt to obtain

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F.2d 1003, 1006 (5th Cir.), *cert. denied*, 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980);[15] *see also Funchess v. Wainwright*, 788 F.2d 1443, 1445 (11th Cir.1986) (per curiam); *Stephens v. Kemp*, 721 F.2d 1300, 1303 (11th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 1043, 105 S.Ct. 530, 83 L.Ed.2d 417 (1984); *Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *Haley v. Estelle*, 632 F.2d 1273, 1275 (5th Cir. Unit A 1980). Once the state contends that the petitioner's delayed presentation of his claim constitutes an abuse of the writ, the petitioner has the bur-

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habeas relief is unsuccessful. Nor will equity countenace inexcusable neglect. If the petitioner possessed the ingredients of his claim (the facts and the law) but simply neglected to bring it in his prior petition, a federal court, pursuant to Rule 9(b), may decline to consider the claim. There are sound policy reasons for this rule: (1) the need for finality of state court convictions; (2) the need to aid enforcement of state procedural rules barring the consideration on the merits of claims not seasonably presented (when the state has declined to decide the claim on the merits because of petitioner's procedural default); (3) the federal courts constitute a scarce resource and thus piecemeal litigation, which needlessly taxes the courts' dockets and prevents other litigants from having a speedy determination of their claims, should be avoided; and (4) federal court consideration of successive petitions harasses the state. *See Haley v. Estelle*, 632 F.2d 1273, 1276 (5th Cir. Unit A 1980) ("Rule 9(b) was intended to eliminate the repetition of identical claims and the prolongation of litigation by the presentation of claims in a piecemeal fashion."); Rule 9(b) advisory committee's note ("This subdivision is aimed at screening out the abusive petitions from [the] large volume of second petitions], so that the more meritorious petitions can get quicker and fuller consideration.").

15. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

den of satisfying the habeas judge that he delay is excusable. The sufficiency of the peitioner's explanation is a matter committed to the judge's sound discretion. *See supra* note 13.

Whether a petitioner's failure to assert his claim in an earlier habeas proceeding is excusable will depend, of course, on the reasonableness of his conduct under the circumstances. For example, the court may deem a pro se petitioner to have waived his claim if it can be said that a reasonable person standing in his shoes could have brought the claim.[16] *See Price v. Johnston*, 334 U.S. 266, 292, 68

16. Arguably, a petitioner could be considered as having proceeded pro se in his previous habeas action if his counsel performed so ineptly as to have effectively rendered him without counsel. In this case, Moore does not contend, or even suggest, that his prior habeas counsel were inept.

In a case in which counsel prosecuted the petitioner's first habeas petition so ineptly that the petitioner could be considered as having proceeded pro se, the petitioner may have little difficulty in demonstrating that his failure to include a particular claim in his first petition was justified or excusable in the circumstances. I do not, however, endorse the majority's attempt to engraft analysis of ineffective assistance of counsel, in the sixth amendment sense, into the doctrine of abuse of the writ. In the majority's view, for example, Moore did not abuse the Great Writ when he failed to present his *Estelle v. Smith* claim in his first federal habeas petition, because "[a]n attorney's failure in 1978 to recognize the potential intersection of *Miranda* and Georgia capital sentencing proceedings, does not cause his performance to fall outside of 'the wide range of professionally competent assistance.' " *Ante* at 854 (quoting *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)).

This approach emasculates the doctrine of abuse of the writ because the failure to include a claim will almost always be excused. It will be excused under either of two theories,

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one of which will apply in nearly every case. The first excuse is that petitioner's previous habeas attorney was ineffective; the attorney should have prosecuted the omitted claim—its legal basis being readily available—but failed to do so because of his incompetence. This incompetence, in turn, effectively rendered petitioner without counsel. Thus, in deciding whether inexcusable neglect should preclude petitioner from litigating the omitted claim in the successive petition, the district court must treat petitioner's prior omission as that of a pro se litigant. Under the relaxed standard applicable to such litigants, the court will probably allow the petitioner to litigate his claim on the merits.

The rationale for the second excuse, contrary to that of the first excuse, assumes that the petitioner's previous habeas attorney was not ineffective; the attorney failed to prosecute the omitted claim because its legal basis was unavailable. Under these circumstances, the court will entertain the claim because it is based on "new law."

Following the majority's approach, a wise petitioner will assert both theories, alternatively, in response to the state's contention that his failure to present the omitted claim earlier is inexcusable. If the petitioner satisfies the court, as Moore has satisfied the majority in this case, that his claim is founded on new law, the court must adjudicate his claim on the merits. If he fails to convince the court that his theory of relief is new—because the theory was extant at the time of the previous habeas proceeding—then, petitioner will argue the court must find that his attorney was "ineffective." In either case the result is the same: the court entertains the claim on the merits. The concept of inexcusable neglect ceases to exist.

The majority's approach to abuse of the writ analysis defies logic. It also lacks any support from precedent or policy. First, there is no constitutional right to effective assistance of counsel in habeas corpus proceedings. *See* U.S. Const. amend. VI ("*In all criminal prosecutions,* the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.") (emphasis added); *see also Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir.1985) (per curiam) ("[T]here is no constitutional right to the assistance of counsel in a collateral at-

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S.Ct. 1049, 1063, 92 L.Ed. 1356 (1948); *Booker v. Wainwright*, 764 F.2d 1371, 1376-78 (11th Cir.) (quoting *Mays v. Balkcom*, 631 F.2d 48, 51 (5th Cir.1980)), *cert. denied*, 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985); *Haley*, 632 F.2d at 1275-76. A petitioner represented by counsel, on the other hand, may be deemed to have waived his claim if a reasonably competent attorney could have recognized and prosecuted the claim. *See Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir.1983) (en banc) ("Given [the] elemental

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tack on a conviction."); *Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981) ("[Habeas corpus proceedings] are civil proceedings not covered by the Sixth Amendment which applies only during the pendency of the criminal case."); *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir.1973) (sixth amendment inapplicable outside the context of criminal trial); *see also Pennsylvania v. Finley*, — U.S. —, —, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987) (no right to counsel on collateral attack).

Second, the policies of federal habeas corpus do not require that a habeas counsel's "inffectiveness" excuse the petitioner's failure to present a claim in a timely manner. The petitioner has an obvious interest in the just resolution of his constitutional claims, but he does not have a constitutionally guaranteed right to effective habeas counsel. Countervailing considerations—such as finality of conviction, deterring counsel's sandbagging of established claims, and the doctrine that a habeas petitioner must be held accountable for the actions of his attorney—outweigh the petitioner's interest, assuming, at least, that his counsel was not so ineffective as to render his presence in the case irrelevant. Indeed, if attorney ineffectiveness constitutes an excuse for Rule 9(b) purposes, the only deterrent to the piecemeal litigation of claims will be counsel's self-interest in avoiding a charge, brought by the lawyer prosecuting the petitioner's successive petition, that he was professionally incompetent.

Finally, inherent in the "inexcusable neglect" standard is the notion that lawyer neglicence is not a ground for excusing the failure to present a constitutional claim in a timely fashion.

role of counsel in our adversary system, we think it inevitable that the inquiry into excuse for omitting a claim from an earlier writ will differ depending on whether petitioner was represented by counsel in the earlier writ prosecution."), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2356, 80 L.Ed.2d 829 (1984); *see also Hamilton v. McCotter*, 772 F.2d 171, 178-80 (5th Cir.1985). In sum, if a petitioner fails to prosecute a claim when its factual and legal bases are present, two inferences are permissible: either he is deliberately withholding the claim, perhaps with the idea of asserting it in a subsequent petition, or he is simply neglecting to pursue it.

In this case, the State contends that Moore's failure to assert in his first petition the claims now before us was inexcusable. The State notes that Moore was represented by counsel throughout his collateral attacks on his convictions and death sentence, that there are no newly discovered facts in Moore's case—the facts supporting each of his claims being well known at the time he brought his first petition—and that the federal constitutional implications of those facts were plainly discernable from the relevant case law. Moore acknowledges that there are no newly discovered facts; his disagreement with the State, the district court, and the panel concerns the legal significance of the facts.[17] Moore contends that a reasonably competent lawyer, standing in the shoes of his previous habeas counsel, did not have the tools to fashion the constitutional claims, explicitly recognized in *Estelle v. Smith* and *Prof-*

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17. Moore's disagreement with the State on the "new law" point concerns his *Estelle v. Smith* and *Proffitt* claims. I discuss the parties' dispute over Moore's *Gardner* claim in Part VI *infra*.

fitt, concerning the sentencing court's receipt into evidence of the probation officer's presentence report. Moore submits that this contention, if true, constitutes a lawful excuse, which the district court and panel should have accepted as a matter of law, for the delayed assertion of these constitutional claims.

I disagree with Moore's basic premise regarding what a reasonably competent lawyer should have recognized at the time of Moore's first federal habeas petition. At the time Moore filed that petition, there was ample precedent for the constitutional objections Moore now makes. This point becomes clear when one analyzes the Georgia capital sentencing scheme, as it existed at the time of Moore's sentencing proceeding; the procedures that the court, the prosecutor, and defense counsel followed in conducting that proceeding; and the constitutional precedent available to Moore when he first sought federal habeas relief. Accordingly, I find no abuse of discretion in the district court's refusal to entertain the merits of the claims in question.

III.

Moore presents two "new law" claims in his current habeas petition. The first claim, based on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is that the State failed to inform him of his right to remain silent and of his right to consult with counsel prior to the probation officer's presentence interview of him, in violation of the fifth, sixth, and fourteenth amendments. The second claim, based on *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert.*

denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), is that the sentencing judge denied him the right to confront and cross-examine the witnesses upon whose statements the probation officer based his presentence report. To determine whether a reasonable lawyer should have recognized these claims when Moore filed his first federal habeas petition, it is necessary to appreciate the factual context in which they arose. I therefore begin my analysis with an examination of the Georgia death penalty scheme and the manner in which the trial court, the prosecution, and the defense conducted Moore's sentencing proceeding. In discussing Moore's claims, we must be aware that his defense counsel did not present them to the sentencing court when given the opportunity to do so; that is, the presentence report, which Moore now contends was prepared and introduced into evidence in violation of the Constitution, was admitted into evidence without objection during an adversary proceeding.[18]

A.

The Georgia capital sentencing law, as it existed in 1974, was much the same as it is today.[19] The Georgia legislature enacted this law in light of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726,

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18. Moore's failure to object at the sentencing hearing may constitute a procedural default. *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). This issue is, however, not before the court.

19. The statutory citations in Part III of my opinion are to the provisions that were in effect at the time of Moore's trial in 1974. These provisions continue in force with few substantive changes, none of which are relevant here.

33 L.Ed.2d 346 (1972), which struck down Georgia's previous death penalty statute. *See* 1974 Ga.Laws 352 (codified as amended in scattered sections of the Georgia Code); 1973 Ga.Code 159 (codified as amended in scattered sections of the Georgia Code). The new law provided for a bifurcated capital trial. The first part of the trial concerned the defendant's guilt or innocence. The second part concerned the sentence to be imposed: death or life imprisonment.[20] *See* Ga.Code Ann. § 27-2503(b) (Harrison 1978). As in the case of the guilt phrase of the trial, the defendant in the sentencing phase was entitled to a jury proceeding. *See id.* The defendant could, however, waive his right to a jury in either phase of the case and elect to proceed before the trial judge.

In seeking capital punishment, the state had the burden of proving beyond a reasonable doubt that the defendant's case was eligible for the death penalty by establishing one or more of ten statutory aggravating circumstances.[21] *Id.* § 26-3102;[22] *id.* § 27-2534.1(b), (c); *see Gregg*

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20. The Supreme Court, in *Gregg v. Georgia*, 428 U.S. 153, 163-64, 96 S.Ct. 2909, 2920-21, 49 L.Ed.2d 859 (1976) (plurality), viewed this sentencing phase as an integral part of the trial of a death penalty case.

21. The ten statutory aggravating circumstances enumerated in section 27-2534.1(b) were as follows:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged

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in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

22. Section 26-3102 stated as follows:

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes

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v. Georgia, 428 U.S. 153, 164-66, 96 S.Ct. 2909, 2921-22, 49 L.Ed.2d 859 (1976) (plurality); *see also* Ga. Code Ann. § 27-2537(c)(2) (Harrison 1978). The state could introduce only that evidence of aggravating circumstances of which it had notified the defendant before trial. *Id.* § 27-2503(a); *see also Potts v. State,* 241 Ga. 67, 243 S.E.2d 510, 522 (1978).

The defendant could avoid the imposition of the death penalty in any of three ways. The first was to convince the court on motion for directed verdict that the state's evidence failed to establish an aggravating circumstance.[23] The second was to convince the jury that the state failed to carry its burden of proof on that issue. Finally, the defendant could urge the jury not to impose the death penalty because of mitigating circumstances present in the case. Under Georgia law, the defendant had wide latitude

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a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

23. The trial judge's determination as to the sufficiency of the evidence supporting the aggravating circumstances was subject to judicial review. *See* Ga.Code Ann. § 27-2537(c)(2) (Harrison 1978).

in introducing mitigating evidence. *Gregg,* 428 U.S. at 164, 96 S.Ct. at 2921 (citing *Brown v. State,* 235 Ga. 644, 647-50, 220 S.E.2d 922, 925-26 (1975)).

The sentencing proceeding I have described was clearly adversarial. Like a criminal trial, it began with the prosecutor's opening statement, explaining what the state must prove and how it intended to satisfy its burden. After the defense's opening statement, which could be reserved until the close of the state's case, the prosecution presented its evidence, which the defense was entitled to cross-examine. When the state rested its case, the defense had the right to seek a directed verdict on the aggravating circumstances issue. If the court did not direct a verdict, the defense could rebut the state's evidence of aggravating circumstances and could present mitigating evidence. The state, in turn, had the right to rebut the defendant's case. At the close of all the evidence, both sides argued their case to the jury, the court instructed the jury on the law, and the jury retired to deliberate its verdict—the death sentence or life imprisonment. The trial judge then imposed the sentence in accordance with the jury's verdict. Cases tried to the court instead of to the jury followed the same procedures, except that the trial judge replaced the jury as the finder of fact and the sentencer.

B.

Moore's 1974 sentencing hearing followed these procedures. On June 4, 1974, Moore pled guilty to the charge of malice murder and armed robbery and waived his right to jury sentencing. The court scheduled the sentencing hearing in Moore's case for July 21, 1974, and directed its

probation office to prepare a presentence report.[24] Following normal procedures, Probation Officer Rachels interviewed Moore, inquiring into the circumstances of the murder and armed robbery offenses he had committed and into his background. Moore contends that Rachels violated *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by not advising him of his rights to remain silent and to have the presence of counsel during the interview, and that Rachels violated the sixth amendment by interviewing him without notifying his attorney. For purposes of this appeal, I assume the truth of these allegaitons. At the same time, I note that these constitutional violations were of no consequence until Rachels' report was received into evidence and thus made available to the trial court.

At the same time prior to the sentencing hearing, the prosecutor informed Moore's attorney that the state would seek the death penalty based on one aggravating circumstance—that Moore had committed the murder in question while he was engaged in the commission of armed robbery. At the sentencing hearing, the prosecutor presented the state's case as if he were establishing the defendant's guilt as well as seeking a death sentence. He called four witnesses: a medical examiner, two Georgia Bureau of Investigation agents, and the sheriff of Jefferson County,

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24. Georgia law authorized trial judges to request a presentence report in all criminal cases, except those involving offenses punishable by death or life imprisonment, for the purpose of determining whether to place the defendant on probation and the conditions of his probation supervision. Ga. Code Ann. § 27-2709 (Harrison 1978). The record does not disclose why the court disregarded this statutory prohibition in this case.

Georgia, who collectively established how Moore had committed the crimes. Moore's trial counsel cross-examined each of these witnesses. In addition, the prosecutor offered the presentence report into evidence during the State's case in chief without calling Officer Rachels to the witness stand. In offering the report, the prosecutor stated that "Counsel for the Defendant has received a copy of the report so that it will be included in the record, which includes reports and letters that have been submitted by Counsel for the Defendant." In response, Moore's attorney stated, "That is agreeable, Your Honor, and at the same time we would like for a copy of the warrants to go in also."[25] The prosecutor also introduced various

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25. This statement by Moore's attorney, considered in light of the evidentiary record of Moore's first state habeas proceeding, which contains, among other things, a statement by Officer Rachels that he gave Moore's attorney a copy of the presentence report on the day of the sentencing hearing, convinces me, as it did the state habeas court and the district court below, *see infra* Part VI, that Moore's *Gardner* claim is baseless. Contrary to Moore's present allegations, his attorney had an opportunity to inspect the presentence report before the prosecutor offered it into evidence and to object if he thought that the report contained inaccurate statements or material omissions. To me, this fact explains why counsel did not object to the report on the ground that he had not seen it or, having seen it, had not had sufficient time to consult with his client about any inaccuracy in the report.

In fact, the record unequivocally demonstrates that defense counsel communicated with Officer Rachels concerning the presentence report on several occasions prior to the sentencing hearing, and that he furnished Rachels with several letters vouching for Moore's character and various records of Moore's previous academic achievements. Apparently as a matter of strategy, Moore's attorney chose to present this mitigating evidence to the trial judge through the probation offic-

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other exhibits, including photographs of the victim, and of the crime scene, diagrams, a crime lab report, and the victim's shotgun. Moore's counsel expressly declined to object to the introduction of any of these exhibits, including, as I have noted, the presentence report.[26] After the

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er's presentence report rather than through the live testimony of witnesses. This strategy may account for the failure of defense counsel to invoke the well-established evidentiary rules discussed *infra* note 26 and to object to the report's admission into evidence. Perhaps, the same strategy also explains why defense counsel did not object to the report on the fifth and sixth amendment grounds Moore now asserts. In pursuing this strategy, counsel must have appreciated the fact that the report's description of the murder and armed robbery simply replicated the facts the prosecutor established at the sentencing hearing and thus caused Moore no prejudice.

26. When the prosecutor offered the presentence report, Moore's attorney, if he wished to preclude the court from using it, could have objected to the report's admission into evidence on the ground that the report had not been authenticated by the probation officer who prepared it. This objection would have been well founded and would have prompted the prosecutor to call Officer Rachels to the stand. Even had the State authenticated the report by live testimony, the defense still could have prevented the report from being received into evidence. The defense could have established that the report was not admissible because it was merely a recording of Rachels' present recollection, and that if the prosecutor wanted to bring the contents of the report before the court he would have to do so through Rachels' live testimony, albeit refreshed by reference to the report. Assuming the validity of this argument, which had solid support in the law of evidence, *see* G. Lilly, *An Introduction to the Law of Evidence* 231-32 (1978); *see also McCormick on Evidence* § 9 (E. Cleary 2d ed. 1972), the prosecutor would have proceeded to elicit from Rachels what he had learned concerning the circumstances of both the murder and the armed robbery and of Moore's background.

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Any statements Moore had given Rachels would have constituted admissions and thus would not have been precluded by the hearsay rule. These statements would have been subject to objection, however, on *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and sixth amendment grounds—the argument being that Officer Rachels, in interviewing Moore and particularly in focusing on how the crimes were committed, occupied a position similar to that of a police officer interrogating a defendant in custody during a critical stage of his criminal proceedings. Because Rachels had not given Moore a *Miranda* warning and had not notified Moore's lawyer before commencing the interview, the defense could have urged the court to suppress any information Rachels obtained from Moore. Further, the defense could have objected to any background information Rachels may have obtained from sources other than Moore as hearsay, if offered to prove the truth of the contents, and on confrontation clause grounds.

In sum, Moore's attorney could have kept the entire presentence report, as a document, out of evidence on obvious evidentiary grounds. As for Officer Rachels' testimony concerning the substance of the report, Moore's attorney could have made good faith objections (1) on *Miranda* or right to counsel grounds to any statements Moore made to Rachels and to any information derived from those statements, and (2) on confrontation clause grounds to any statements Rachels obtained from other sources if offered to prove the truth of their contents. The requirement that the sentencing decisionmaker find at least one statutory aggravating circumstance beyond a reasonable doubt, in my view, means that the full panoply of constitutional protections available during the prosecution of a criminal case applied to the sentencing phase of capital cases in Georgia in 1974, and thus to the sentencing phase of Moore's case. These rights included the right implicated in Moore's *Estelle v. Smith* and *Proffitt* claims: the fifth amendment right not to be compelled to incriminate oneself, *see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); the sixth amendment right to counsel, *see Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and the sixth amendment right to confront and

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State rested, the defense presented its case. Moore's counsel called four witnesses, including the defendant, to establish mitigating circumstances.

Following a recess for lunch, the trial judge heard the arguments of the prosecution and of the defense, none of which was transcribed. After another recess, the trial judge sentenced Moore to death, finding beyond a reasonable doubt that Moore was engaged in armed robbery at the time of the murder and that there were no mitigating

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cross-examine the prosecution's witnesses, see *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Having created an adversary criminal proceeding in which the factfinder must find an aggravating circumstance beyond a reasonable doubt, as a condition precedent to the imposition of the death penalty, Georgia would have violated the Constitution if, during the sentencing phase of a capital trial, it denied the defendant the rights the Constitution guaranteed him during the guilt phase of the prosecution. *Cf. Gardner v. Florida*, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (plurality) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases."); *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975) (noting importance of advocacy of counsel in the factfinding process of criminal trials). The conduct of the court and of counsel during the prosecution of Moore's case supports my view that Georgia's capital sentencing scheme accommodated these basic constitutional rights, including the specific constitutional rights concerning the presentence report Moore seeks to enforce in the present habeas proceeding If Moore's trial attorney could have made these arguments at the July 1974 sentencing hearing, it logically follows that his habeas attorney could have presented them when he filed Moore's first federal habeas petition in November 1978, particularly given the state of the law in 1978. *See infra* parts IV and V.

circumstances sufficient to outweigh this aggravating circumstance.[27]

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27. The court made the following findings:

> On the question of punishment, prior to the imposition of the death penalty, one statutory aggravating circumstance is found by the Court to exist, to wit: the murder of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is, armed robbery of the said Fredger Stapleton. Also, I find that the armed robbery of Fredger Stapleton was committed while the accused, William Neal Moore, was engaged in the commission of another capital felony, that is murder of the said Fredger Stapleton.
>
> . . . .
>
> The death penalty statute of Georgia, Code section twenty-seven, twenty-five thirty-four point one, requiring proof of aggravating circumstances to justify the imposition of the death penalty was enacted by the General Assembly of Georgia, signed into law by the Governor of Georgia, and held to be constitutional by the Supreme Court of Georgia in Coley versus State, two thirty-one Georgia, eight twenty-nine. It is therefore the function of this Court to apply this statute to the facts of this case in determining the punishment to be imposed. This I have done.
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> . . . .
>
> IT IS FURTHER ordered and adjudged by the Court that on the thirteenth day of September nineteen seventy-four, the defendant, William Neal Moore, shall be executed by the Director of the State Department of Corrections at such penal institution as may be designated by said Director. . . .
>
> SO, I FOUND aggravating circumstances. I also found, but I didn't need to find, for purposes of this finding, mitigating circumstances insofar as the aggravating circumstances were concerned. Mitigating means good circumstances, those being your willingness and your forthrightness in meeting what must be to you a terrible, terrible experience. So that does go to your credit, but for the purposes of this Court, for this finding, I could not in good conscience apply in your case sufficient to wipe out the aggravating statutory circumstances.

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IV.

A review of the state of the law in 1978 demonstrates that the fifth and sixth amendment claims I have described, i.e., Moore's *Estelle v. Smith* and *Proffitt* claims, were available to a reasonably competent attorney. In the next two parts of this opinion, I discuss the specific precedential antecedents of *Estelle v. Smith* and *Proffitt.* Contrary to the majority's conclusion, I believe that these antecedents provided Moore with the tools to present his fifth and sixth amendment claims in his first federal habeas corpus petition.

A.

Moore claims that the State infringed his fifth amendment right against self-incrimination and his sixth amend-

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We've got this. If we're going to philosophy [sic] about it, and if I'm permitted to do that, I'll do it. People in their homes—the most precious place a man can have—is his home; and to be in a home, and probably this man was asleep, I don't know, or for any person to be, not this man, but any person, to be asleep in his home, to be invaded by an intruder, that's armed with weapons, that's prepared necessarily to kill (or otherwise the weapon wouldn't be there in the hands of the intruder), is probably an invasion of the highest injustice that another can do. Now, I can only imagine that anyone that is invaded by an intruder with an armed weapon, the fear that they must go through when they are encountered in such a situation. So, I feel like that if the Court ever does require mandatory punishment—that is when they specify by law what offenses will have to be suffered by the electric chair—that one of these statutory offenses probably will be that when a person is robbed and killed in his home, that mandatory, as contrasted to discretionary, statutory aggravated circumstances will probably warrant the electric chair without life imprisonment. That justifies me in making the finding that I made.

ment right to counsel when Probation Officer Rachels interviewed him without giving him a *Miranda* warning and giving his counsel advance notice of the interview. These infringements subsequently operated to his detriment, Moore contends, when the trial judge relied on information contained in Rachels' presentence report to determine his sentence. Moore alleges that he was not properly warned that he had a fifth amendment right to remain silent, or that the information he revealed could be used against him. He further alleges that he was not told of his sixth amendment right to consult with counsel. Moore argues, and the majority agrees, that he is excused from having presented these allegations in his earlier petition because the Supreme Court did not *explicitly* recognize that a defendant's fifth and sixth amendment rights apply to the penalty stage of a capital proceeding until its decision in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Because I do not believe that the constitutional principles articulated in *Estelle v. Smith* were the type of " 'new' constitutional rule[s]," *Reed v. Ross*, 468 U.S. 1, 17, 104 S.Ct. 2901, 2911, 82 L.Ed.2d 1 (1984), that might excuse a habeas petitioner from failing to invoke them at an earlier time, I believe that Moore's attempt now to seek relief under those principles is an abuse of the writ. *See Potts v. Zant*, 638 F.2d 727, 741 (5th Cir. Unit B Feb. 1981), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).

In *Estelle v. Smith*, the trial judge, *sua sponte*, ordered that the defendant undergo a psychiatric examination to determine his competency to stand trial for a capital crime. The judge subsequently found the defendant

competent and, following a trial, a jury convicted him of the capital crime. At the penalty stage of the proceeding, the State offered the testimony of the court-appointed phychiatrist, who had examined the defendant solely for competency purposes, to prove the defendant's future dangerousness, a condition precedent to the imposition of the death penalty. Basing his testimony on his competency examination, the psychiatrist testified that he believed that the defendant would always be dangerous. The jury, relying on this testimony, mandated the death penalty. *See Estelle v. Smith*, 451 U.S. at 456-60, 101 S.Ct. at 1870-71.

The Supreme Court, affirming a unanimous panel of the former Fifth Circuit, held that the State's use of the phychiatrist's testimony had violated the fifth, sixth, and fourteenth amendments. Finding the psychiatric examination analogous to the custodial interrogation in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court held that the defendant should have received a *Miranda* warning before the psychiatrist interviewed him. *See Estelle v. Smith*, 451 U.S. at 466-69, 101 S.Ct. at 1875-76. Furthermore, the Court unanimously concluded that under the sixth and fourteenth amendments, the psychiatric examination was a critical stage of the criminal proceeding, and thus the State should have forewarned the defendant's attorney that the results of that examination could be used other than for a determination of his client's competency to stand trial. Because the attorney had not been so informed, the State had denied the defendant his right to consult with counsel during a critical stage of the proceedings. *See id.* at 469-72, 101 S.Ct. at 1876-77.

Subsequently, our predecessor court held that we should apply *Estelle v. Smith* retroactively. *See Battie v. Estelle*, 655 F.2d 692, 696-99 (5th Cir.1981). The court reached this decision by relying on a two-pronged test, the first part of which is relevant to the issue presently before us. Specifically, the court stated that although "a decision which establishes a *new* principle of law" will be only prospectively applied, *id.* at 697 (emphasis added), "[a] decision which merely restates existing law or which simply applies already established law to a set of facts different from those which gave birth to the original principle is given retroactive application," *id.* The former Fifth Circuit then traced the state of the law prior to *Estelle v. Smith*, and concluded that "the holding in *Smith* followed logically from the *Miranda* decision itself," *id.* at 699, noting that both cases were "concerned with official custodial interrogations of an accused and the use of statements obtained from an accused without an attorney in such circumstances to prove the State's case against the accused." *Id.* (footnote omitted). In sum, the court held that "*Smith* did not establish a new principle of federal constitutional law." *Id; see also Muniz v. Procunier*, 760 F.2d 588, 590 (5th Cir.) (decision of new Fifth Circuit that the Supreme Court, in *Estelle v. Smith*, saw the State's conduct "as violating *clearly established* constitutional law") (emphasis added), *cert. denied*, 474 U.S. 934, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985).

Holdings of the former Fifth Circuit are binding upon this court unless overruled by an en banc decision. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all deci-

sions of the former Fifth Circuit handed down prior to October 1, 1981). Because we took this case en banc, we have the opportunity to overrule the *Battie* holding if that step is desirable. I am unconvinced, however, that *Battie* was decided erroneously, and unlike Judge Godbold, I would therefore reaffirm its holding that *Estelle v. Smith* did not spring full blown and without warning into the law of criminal procedure.[28] Furthermore, even ignoring *Battie,* an investigation of what Judge Godbold terms "the state of the law in November 1978," *see ante* at 851 reveals that case law then existing "laid the basis for [Moore's] constitutional claim." *Engle v. Isaac,* 456 U.S. 107, 131, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982).

B.

The state of the law in 1978, when Moore filed his first federal habeas petition, demonstrates that he cannot be excused for having failed to recognize and allege his *Estelle v. Smith* claim. *Estelle v. Smith* was merely the refinement of constitutional principles that the Supreme Court had already established; Moore therefore had ample thread from which to weave the fifth and sixth amendment

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28. Judge Godbold's limited discussion of *Battie* fails to distinguish adequately the question decided in that case from the one we face today. I think it is clear that if we adopt Judge Godbold's argument, we eliminate the foundation of *Battie.* If Judge Godbold in fact means that the Supreme Court's decision in *Estelle v. Smith* was so unexpected, and such a clear break with the past, that a reasonable lawyer lacked the "tools" to raise such a claim, then I submit that this court is obligated to reconsider our precedent holding *Estelle v. Smith* retroactive. *See Allen v. Hardy,* — U.S. —, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) (new constitutional standards rarely applied retroactively).

claims recognized in that case when he first sought federal habeas relief.

Fifteen years before its *Estelle v. Smith* decision, the Supreme Court established safeguards to protect fifth amendment rights during custodial questioning. In *Miranda v. Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966), the Court announced the well known "*Miranda* warning" and stated that "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Following *Miranda,* in *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Supreme Court further extended the protection of the fifth amendment. In that case, the state argued that the right against self-incrimination should not apply in juvenile courts, because proceedings in those areas were "civil" rather than "criminal." The Court, however, refused to accept such a mechanical view of the fifth amendment, finding it "clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Id.* at 49, 87 S.Ct. at 1455.

The Supreme Court's expansion of the fifth amendment right against self-incrimination described above, along with its decisions broadening the sixth amendment right to counsel, *see, e.g., Mempa v. Rhay,* 389 U.S. 128, 134-37, 88 S.Ct. 254, 256-58, 19 L.Ed.2d 336 (1967) (right to counsel applies to "every stage of a criminal proceed-

ing where substantial rights of a criminal accused may be affected," including sentencing and probation revocation); *In re Gault*, 387 U.S. at 34-42, 87 S.Ct. at 1447-51 (right to counsel during juvenile delinquency proceedings); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (plurality) (majority of Court agreeing that sixth amendment right to counsel attaches at "critical stage" of proceedings), provided Moore with the tools from which he could have crafted his claim that his fifth and sixth amendment rights attached at the penalty stage of his trial as well as at the guilt stage. I cannot agree with Judge Godbold's view that in 1978 a reasonable attorney could not have recognized and presented a non-frivolous argument that the standards these cases established should also apply during the sentencing stage of a bifurcated capital trial.[29]

My conclusion is supported by two other factors especially significant in deciding whether Moore can be excused for failing to argue his *Estelle v. Smith* claim in his first federal habeas petition. First, Moore's claim arose in the

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29. Judge Godbold, in stating that a reasonably competent attorney could not have anticipated the application of the fifth and sixth amendments in the *Estelle* v. *Smith* factual context, implies that such an attorney would have had even more difficulty anticipating the application of those principles in the factual context presented in this case. *See ante* at 853 n. 10. I disagree. The applicability of the *Estelle* v. *Smith* principles to a probation officer's interview of the defendant is more obvious than is the applicability of those principles to a psychiatric interview of the defendant. The probation officer in this case was acting as would a policeman. He questioned the defendant during a critical stage of the criminal proceeding, and the primary focus of the interview was to elicit from the defendant precisely how he committed the murder and armed robbery of the victim.

context of a capital case. Following the Supreme Court's decisions in, among others, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality); and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality), a reasonable lawyer could have recognized that constitutional claims that might be unmeritorious in a non-capital proceeding could be tenable if a sentence of death was involved.[30] Indeed, even before Moore filed his first habeas petition, the Supreme Court had explicitly recognized that a majority of its members acknowledged the special concerns of capital sentencing and agreed that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (plurality). Second, the Court's opinion in *Gardner*, decided well over a year before Moore first sought habeas relief, eliminated any doubt that a defendant's constitutional rights apply to the sentencing stage as well as to the guilt stage of a capital case. *See id.* at 358, 97 S.Ct. at 1204-05

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30. I do not mean to argue that the rights affirmed in *Estelle* v. *Smith* apply only when a defendant faces capital punishment. The *Estelle* v. *Smith* Court rested its decision solely on the fifth and sixth amendments (as applied to the states through the fourteenth amendment), not on the eighth amendment (as applied through the fourteenth amendment). *See Estelle* v. *Smith*, 451 U.S. at 473, 101 S.Ct. at 1878; *Battie* v. *Estelle*, 655 F.2d 692, 700 n. 17 (5th Cir.1981). My discussion in the text is merely meant to point out that an attorney in 1978, recognizing that the law regarding capital sentencing was in flux, might have been especially likely to foresee the explicit application of certain constitutional safeguards to the penalty stage of a bifurcated capital proceeding.

(sentencing process is a "critical stage" and it "must satisfy the requirements of the Due Process Clause").[31] With *Miranda* and *Gardner*, and the Court's intervening decisions, a lawyer in 1978 easily could have discerned the constitutional infirmities Moore now raises.[32]

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31. Judge Godbold attempts to distinguish *Gardner's* importance by noting that it was a plurality opinion. First, five justices agreed that the defendant in *Gardner* was entitled to constitutional protections, other than those derived from the eighth amendment, during the sentencing phase of his trial. Second, the entire thrust of the "new law" exception to the abuse of the writ doctrine is to excuse claims based on "unanticipated" changes in the law, not to allow a petitioner to sit back and ignore his nascent claims until a majority of the Supreme Court announces a favorable decision. Thus, the number of justices who explicitly ascribed to that portion of *Gardner* relevant to this case is of no significance. For the "novelty" argument, the point is that the Court had explicitly given lawyers a powerful tool to build constitutional arguments for actions relating to sentencing.

32. As I demonstrated in the text, by 1978 a reasonable lawyer had the tools from which he could construct the *Estelle v. Smith* claim that Moore now seeks to assert in his successive petition. Even if the petitioner in *Estelle v. Smith* was the very first person actually to litigate his type of claim, Moore would still be unable to argue "novelty" to excuse his failure earlier to raise his claim. The fact of the matter, however, is that before Moore brought his first federal habeas petition on November 22, 1978, litigants had already raised similar claims in other criminal cases. *See Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex.1977) (district court decision in case upon which Moore rests his claim decided nearly one year before Moore filed his federal habeas petition), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Livingston v. State*, 542 S.W.2d 655, 661-62 (Tex.Crim.App. 1976) (addressing contention that testimony by state appointed psychitarists at penalty stage of capital trial, based on interview with defendant, violated federal Constitution), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); *Armstrong v. State*, 502 S.W.2d 731, 734-35 (Tex.Crim.App

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V.

In his second federal habeas petition, Moore also presented, for the first time in federal court, a claim that the admission into evidence of the presentence report violated his sixth amendment right to confront and cross-examine the witnesses whose statements the report memorialized. Specifically, he alleged that an opportunity to confront and cross-examine those witnesses "could have corrected the misimpressions about his financial, military and marital circumstances, clarified the circumstances of the crime, and presented the truth about his prior juvenile record." The majority today holds that Moore's failure to raise this claim in his earlier petition was excused because confrontation rights were not explicitly extended to capital-sentencing proceedings until this court's decision in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir.1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983). Because I believe that *Proffitt*, like *Estelle v. Smith*, did not articulate

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1973) (same). Although the Texas state court decisions had rejected the claim the Supreme Court later upheld in *Estelle v. Smith*, this result does not excuse Moore's failure to raise a similar claim in his first federal habeas petition. Given that previous state court rulings contrary to a defendant's federal claim do not excuse his failure to object timely during his state court proceedings, *see Engle v. Isaac*, 456 U.S. 107, 130, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783 (1982), surely such rulings cannot excuse a petitioner's failure to raise those claims in a *federal* forum. Thus, the state court rulings cited above are significant not for their holdings, but because they evince other defendants' recognition—prior to *Estelle v. Smith*—that the state's use of certain evidence in sentencing a defendant was susceptible to a constitutional challenge.

a new constitutional rule, I would affirm the district court's judgment that Moore's omission of this claim in his earlier petition was not excusable.

In *Proffitt,* the defendant submitted to examination by two psychiatrists prior to sentencing. One of the psychiatrists was subsequently unable to attend the defendant's sentencing hearing before the trial judge, and his views concerning the defendant's competence and mental state were submitted solely in a written report. The defendant requested, but did not receive, an opportunity to cross-examine the psychiatrist concerning the report. *Proffitt,* 685 F.2d at 1250-51 & n. 36a.

The *Proffitt* court noted that the rights secured by the sixth amendment, including the right to cross-examine adverse witnesses, apply only to "critical stages of the trial." *Id.* at 1252 (citations omitted). Acknowledging that the protections of the sixth amendment do not apply with full force in all sentencing proceedings, the court noted that the applicability of cross-examination rights to capital-sentencing hearings "has not been specifically addressed by the Supreme Court and is an issue of first impression in this Circuit." *Id.* at 1253. The court concluded that Proffitt was entitled, under the sixth amendment, to cross-examine the psychiatrist at his sentencing hearing. *Id.* at 1255.

Proffitt was presaged by a long line of cases extending sixth amendment protections in a variety of contexts, as well as by cases addressing the special safeguards constitutuionally mandated in capital cases. In 1965, the Supreme Court held that the sixth amendment secures the right to cross-examine adverse witnesses in state criminal

proceedings. *See Douglas v. Alabama,* 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965); *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The High Court has repeatedly recognized that the right to cross-examine adverse witnesses, like the right to counsel, is a fundamental requirement for a fair trial and for ensuring due process of law. *Chambers v. Mississippi,* 410 U.S. 284, 294-95, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); *Pointer,* 380 U.S. at 405, 85 S.Ct. at 1068; *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948).

As this court noted in *Proffitt,* 685 F.2d at 1252 (citations omitted), the right to cross-examination only applies to "critical stages of the trial." During the 1960s and 1970s, the extent to which various phases in the criminal process, including sentencing hearings, constituted "critical stages" for purposes of the sixth amendment was an unsettled question. *See, e.g., United States v. Fatico,* 579 F.2d 707, 713-14 (2d Cir.1978); Taparauskas, *An Argument for Confrontation into the Sentencing: Bringing the Offender into the Sentencing Process,* 8 Cumb.L.Rev. 403, 426-40 (1977); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 Tex.L.Rev. 1, 1-6 (1968).

Although the law in this field was in a state of disarray, the clear trend was toward expanding the full panoply of sixth amendment rights, including the confrontation rights. *See, e.g., Clements v. Turner,* 364 F.Supp. 270, 275 (D.Utah 1973); Taparauskas, *supra,* p. 873, at 426-40 (discussing trend toward expanded right to confrontation). For example, in *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Supreme Court recognized the

sixth amendment right to counsel in a sentencing and probation revocation hearing, noting as follows:

> There was no occasion in *Gideon* [*v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963),] to enumerate the various stages in a criminal proceeding at which counsel was required, but [several Supreme Court cases] clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, [*Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948),] illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holding that the right to counsel applies at sentencing. Many lower courts have concluded that the Sixth Amendment right to counsel extends to sentencing in federal cases.

Mempa, 389 U.S. at 134, 88 S.Ct. at 256-57 (citations and footnotes omitted). In *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), the Supreme Court noted that parole revocation—*unlike sentencing*—"is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." Nonetheless, the Court held that due process requires that parolees in these proceedings receive an array of procedural protections, including "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Id.* at 489, 92 S.Ct. at 2604; *see Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60, 36 L.Ed.2d 656 (1973) (applying *Morrissey* to probation revocation proceedings).

By themselves, these cases probably foreshadowed our court's holding in *Proffitt* and provided a reasonable basis for the confrontation clause claim Moore seeks to present at this time. Indeed, this type of claim was recognized by many commentators and attorneys well before Moore filed his first federal habeas corpus petition in late 1978. *See, e.g., United States v. Fischer*, 381 F.2d 509, 511 (2d Cir. 1967) (rejecting petitioner's confrontation clause claim involving non-capital sentencing hearing, but acknowledging that "there is a certain amount of persuasiveness to his argument"), *cert. denied*, 390 U.S. 973, 88 S.Ct. 1064, 19 L.Ed.2d 1185 (1968); *People v. Perry*, 36 N.Y.2d 114, 119, 324 N.E.2d 878, 880, 365 N.Y.S.2d 518, 520-21 (1975) (noting and rejecting defendants' confrontation clause challenge involving non-capital sentencing); *State v. Short*, 12 Wash. App. 125, 528 P.2d 480, 483-84 (1974) (same), *review denied*, 85 Wash.2d 1002 (1975); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from* Mempa v. Rhay, 47 Tex.L.Rev. 1, 1-16 (1968) (viewing *Mempa v. Rhay* as the precursor to expanded constitutional protections at the sentencing stage of criminal trials); Taparauskas, *An Argument for Confrontation at Sentencing: Bringing the Offender into the Sentencing Process*, 8 Cumb.L.Rev. 403, 426-38 (1977) (contending that Supreme Court decisions of the 1960s and 1970s foreshadowed the extension of confrontation rights to sentencing); *see also Clements v. Turner*, 364 F.Supp. 270, 275 (D.Utah 1973) ("On the heels of [*Mempa v. Rhay*,] which held that appointed counsel is required in deferred sentencing situations, has come an expansion of the right to counsel beyond even the broad limits placed upon it in that case and an expanded application of the procedural

safeguards of notice, hearing, confrontation and cross-examination in the context of post-conviction proceedings."); *State v. Ortez,* 60 Haw. 107, 588 P.2d 898, 908 (1978) (noting that defendant had made no request for confrontation and cross-examination at sentencing proceeding); ABA Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures 348, 367 (Comp.1974) (discussing right to confrontation at sentencing), *cited in* Taparauskas, *supra,* p. 873, at 439-40.[33]

Even if these lower court cases, commentaries, and arguments of counsel, along with the Supreme Court's decisions in *Mempa, Morrissey, and Gagnon,* were not sufficient by themselves to provide any reasonable attorney with the tools to fashion a *Proffitt* claim, two additional factors compel the conclusion that a *Proffitt* claim was available in 1978. As I noted in discussing Moore's *Estelle v. Smith* claim, *see supra* Part IV.B., Moore's habeas attorney should also have been prompted to raise a *Proffitt* claim (1) because Moore was convicted of a capital crime and (2) because the Supreme Court handed down *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), more than one year before Moore brought his habeas petition in federal court.

In light of the special nature of capital punishment, a reasonable attorney would have been more likely to press a confrontation clause argument with regard to capital sentencing than with regard to non-capital sentencing. *See*

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33. My comments in note 32 *supra* apply with equal force to the discussion in this portion of my opinion.

supra Part IV.B. Given the consequences of a capital sentencing proceeding, Moore could readily have argued that he must have the right to cross-examine a witness whose testimony might determine whether he receives the death penalty or life imprisonment. Moreover, *Gardner* invited this claim through its careful reading of the 1949 decision in *Williams v. New York,* 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). *Williams* held that due process does not require confrontation and cross-examination protections during sentencing proceedings, at least when no objection was made on this ground and background information in the defendant's presentence report was disclosed to the defendant during the proceeding. *Id.; see also Gardner,* 430 U.S. at 355-56, 97 S.Ct. at 1203-04 (plurality). Significantly, *Gardner* noted that the constitutional protections applicable to capital sentencing were evolving, a fact recognized in *Williams. See Gardner,* 430 U.S. at 356-57, 97 S.Ct. at 1204 (quoting *Williams,* 337 U.S. at 247-48, 69 S.Ct. at 1083); *see also* Note, Gardner v. Florida: *The Application of Due Process to Sentencing Procedures,* 63 Va.L.Rev. 1281, 1283 (1977) (hereinafter Note, *Due Process in Sentencing*). The Court in *Garner* then proceeded to discuss cases recognizing the unique nature of capital punishment, and the post-*Williams* cases —including *Mempa*—that extended due process protections to sentencing. In light of this discussion in *Gardner,* and its holding that due process requires that defendants be given an opportunity to explain, rebut, or deny information contained in presentence reports, *Gardner,* 430 U.S. at 362, 97 S.Ct. at 1207, a confrontation clause challenge to capital-sentencing proceedings should have been

obvious to any reasonably competent attorney.[34] *See* Note, *Due Process in Sentencing, supra,* at 1291 (discussing confrontation and cross-examination as rights that *Gardner* may mandate in capital-sentencing proceedings). Thus, I respectfully dissent from the majority's holding that Moore's *Proffitt* claim is novel.

VI.

Finally, I write separately with regard to the majority's analysis of petitioner's claim based on *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Moore's claim is that his sentencing judge imposed the death penalty in part based on a presentence report that petitioner and his counsel did not have "any meaningful opportunity to review, correct or supplement," in violation of the eighth and fourteenth amendments. As the majority notes, this claim is obviously not based on any new legal development, because *Gardner* was decided before Moore filed his first federal habeas petition. In fact, Moore presented this claim in his first state habeas petition (in 1978), and the state court rejected the claim on the merits, finding that Moore's trial counsel had received a copy of the presentence report prior to his sentencing hearing.

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34. Moreover, Moore's counsel during his first state and first federal collateral attacks was aware of *Gardner* and presented a *Gardner* claim to the state court, claiming that Moore was not given an opportunity to deny or rebut material his presentence report contained. *See infra* Part VI. Surely Moore's counsel could have gone one step further and contended that Moore's sixth amendment rights were violated because he was not given an opportunity to confront and cross-examine witnesses whose statements were included in the report.

When Moore brought his first federal habeas petition, on November 22, 1978, he did not include a *Gardner* claim. This omission appears to have been deliberate, and not an oversight, because the claim is noted in the procedural history portion of that petition and because Moore was represented by the attorney, James C. Bonner, Jr., who had prosecuted his state collateral attack. Moore did not seek to add his *Gardner* claim to his petition until October 1, 1980, when his newly appointed substitute counsel sought leave to amend his petition. The district court denied Moore's motion for leave to amend his petition to add the *Gardner* claim, citing his delay in bringing the claim to federal court, his explicit reference to the claim in the procedural portion of his original petition (which indicated that he was fully aware of it when he filed that petition), and his continuous representation by counsel during his state and federal collateral attacks. *Blake v. Zant,* 513 F.Supp. 772, 805 (S.D.Ga.1981). Another ground upon which the district court relied in denying Moore's motion to amend was that his *Gardner* claim was meritless:

> [C]ounsel made explicit reference to the presentencing report issue in the original habeas petition, thus demonstrating beyond doubt that this matter had been considered by him and rejected as a basis for relief before this Court. Counsel's decision cannot be seen as unfounded. This question was considered at length by the state habeas tribunal. Testimony was received from [Moore's trial counsel] and an affidavit was introduced from the officer who prepared the report. Upon examining this evidence and the trial transcript, which appears to show that the report was turned over to [Moore's trial counsel], the Court ruled adversely to the petitioner. No new evidence has been suggested which would cast doubt on this determination.

Id. (citation omitted). Although the district court did not couch this finding as an alternative basis for rejecting Moore's *Gardner* claim, it clearly viewed that claim as having been fully and correctly litigated in the state court. Moreover, it noted that Moore admittedly could produce no evidence to cast any doubt on the state court's disposition.[35]

In these circumstances, I believe we should view the district court's denial of Moore's motion to amend his habeas petition to add his *Gardner* claim as a disposition on the merits. Accordingly, we can treat his attempt to raise this claim anew as a successive petition. Because Moore has presented no reason why he is entitled to relitigate his *Gardner* claim, the claim should be denied as successive pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases, *see* 28 U.S.C. § 2254 (1982).[36]

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35. On appeal, a panel of this court affirmed the district court's denial of Moore's motion to amend, concluding that the district court did not abuse its discretion. *Moore v. Balkcom*, 716 F.2d 1511, 1526-27 (11th Cir.1983) (on rehearing), *cert. denied*, 465 U.S. 1084, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984). The panel did not discuss the district court's treatment of the merits of Moore's *Gardner* claim.

36. The Supreme Court has recently had occasion to examine and refine the standards governing successive federal habeas corpus petitions, i.e., petitions presenting claims that have already been litigated in a prior federal proceeding. *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). In *Kuhlmann*, a four-justice plurality of the Court concluded that the "ends of justice" mandate consideration of successive petitions only when the petitioner "supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at —, 106 S.Ct. at 2627. Three other justices expressed the view that a colorable claim of factual innocence

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Alternatively, I believe we can affirm the dismissal of Moore's *Gardner* claim on the ground that it is conclusively without merit. As the Supreme Court noted in *Sanders v. United States*, 373 U.S. 1, 15, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963) (citations omitted), the abuse of the writ rules "are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. In such a case the application should be denied without a hearing."

For the reasons described herein, I would affirm the district court's dismissal of the petitioner's *Gardner* claim.

VII.

In sum, I respectfully dissent from the majority's analysis and disposition of Moore's *Estelle v. Smith* and *Proffitt* claims. In my view, these claims are not based on

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is not essential to establish that the "ends of justice" warrant reconsideration of a petitioner's previously decided claim. *Id.* at —, 106 S.Ct. at 2634-35 (Brennan, J., joined by Marshall, J., dissenting); *id.* at —, 106 S.Ct. at 2639 (Stevens, J., dissenting). The two remaining justices, Justices Blackmun and White, concurred in the Court's alternative holding, *id.* at —, 106 S.Ct. at 2628-31 (rejecting petitioner's successive claim on the merits), and expressed no view on the need for a colorable claim of factual innocence in a successive habeas petition. Thus, *Kuhlmann* leaves open the proper standard governing successive petitions. In this case, we need not decide whether a colorable claim of factual innocence is an essential prerequisite to a successive habeas petition. Regardless of whether that showing is necessary, Moore's successive *Gardner* claim should not be entertained, because he does not present any new facts or legal developments warranting relitigation of the claim.

"new law," excusing his failure to present them in his first federal habeas petition; the district court acted well within its lawful discretion in concluding that Moore's lack of diligence in prosecuting the claims constituted an abuse of the writ. I also dissent from the court's disposition of Moore's *Gardner* claim, for the reasons expressed herein. Finally, I fully concur in the majority's disposition of Moore's remaining claims.

HILL, Circuit Judge, DISSENTING, in which FAY and EDMONSON, Circuit Judges, join:

"When the right point of view is discovered, the problem is more than half solved." *Ellison v. Georgia R.R.*, 87 Ga. 691, 706-7, 13 S.E. 809, 813 (1891) (Bleckley, Chief Justice).

The right point of view of the issues in this case is this: successive petitions for habeas corpus create a genuine and necessary tension between the institutional desirability of finality of judgment on the one hand and, on the other, society's abhorrence of confinement or other punishment of one who is known to be innocent.

This is not a contrived dispute. It represents the inevitable difficulty in society's accommodation of divergent but valid interests.

In the administration of justice, finality achieved reasonably promptly is important. *See, e.g., Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946) (recognizing that res judicata serves sound "public policy that there must be some end to litigation and that when one appears in court to present his case, is fully

heard, and the contested issue is decided against him, he may not later renew the litigation in another court."); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952) (holding that principles of finality create jurisdictional bar to untimely filing of certiorari petition). There are special reasons why finality is a proper goal in criminal justice.

> At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Mackey v. United States, 401 U.S. 667, 690-91, 91 S.Ct. 1160, 1178-79, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring).

In civil litigation, even a supported protest that the judgment wrongfully deprives one of property or other freedom of action is usually disregarded if that judgment has reached finality. Finality is that important. *Baldwin v. Traveling Men's Ass'n*, 283 U.S. 522, 525, 51 S.Ct. 517, 517, 75 L.Ed. 1244 (1931) (in civil litigation court noted: "Public policy dictates that there be an end to litigation;

that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between parties."); *Bennett v. Commissioner*, 113 F.2d 837, 840 (5th Cir.1940) ("[T]he rule of *res judicata* does not go to whether the judgment relied on was a right or wrong decision. It rests on the finality of judgments in the interest of the end of litigation and it requires that the fact or issue adjudicated remain adjudicated.").

In this country, we acknowledge that our institutions must be fallible because they are the workings of fallible humans and not monarchs divinely appointed. While some risk of the wrong result must be taken in the administration of justice, we recoil from the imprisonment or punishment of one whose innocense can be demonstrated.

Given the right point of view—that this tension must exist in habeas corpus litigation—we see that it has been the task of Congress to relieve the tension to the extent proper. In my view the Congress has done that in its provisions for our dealing with successive habeas corpus petitions. 28 U.S.C. § 2244(a), (b) (1982).

First, these enactments do not disturb the authority of the judicial branch to hear and decide, on first federal petition for habeas corpus, claims of constitutional error in the state court proceedings. Unless limited by some other provision or precedent, *see Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), relief may be granted from state custody where there has been grievous denial of constitutional rights whether or not the petitioner asserts innocence. I take no issue with that; it is compelled by controlling Supreme Court precedent.

What is subject to our resolution today is the availability of successive petitions. Legislative history makes it clear that in 1966, congressional amendment to section 2244 was to achieve "a greater degree of finality of judgments in habeas corpus proceedings" and to add to section 2244 "provisions for a qualified application of the doctrine of *res judicata*." S.Rep. No. 1797, 89th Cong., 2d Sess. 2, *reprinted in* 1966 U.S.CodeCong. & Admin.News 3663, 3664.

Congress successfully accommodated these tensions. It gave the courts authority to refuse to hear petition after petition after petition for the writ of habeas corpus brought by state prisoners, whether claiming innocence or not. However, the establishment of finality in these cases carry the risk that one who is demonstrably innocent may yet be incarcerated only because there is no procedure for obtaining a release order. Therefore, whatever may have been the history of the post-conviction litigation in state or federal court, a U.S. district judge is authorized to accept, hear and consider a successive and even abusive petition for the writ of habeas corpus by a state prisoner should the "ends of justice" require it.

In my view, the meaning of the 1966 amendment must be discovered here by reference to the problem being addressed. If the courts conclude that a determination of the existence *vel non* of "ends of justice" will depend upon whether or not the petitioner claims and offers to prove his innocence, then the goal of finality will have been achieved as far as reasonably possible. The innocent will have a "safety valve" from finality; the guilty will have reached the end of litigation.

In the context of death penalty habeas corpus litigation, one may be guilty of murder and yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocence, I would interpret "innocence," where the death penalty is involved as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

The petitioner in this case makes no claim of innocence; he long ago and promptly confessed to murder accompanied by statutory aggravating circumstances. For the reasons stated above, therefore, and for the reasons so much better articulated in parts II and III of the opinion of Justice Powell in *Kuhlmann v. Wilson*, 477 U.S. 436, —, 106 S.Ct. 2616, 2622-28, 91 L.Ed.2d 364 (1986), I would affirm the district court's judgment dismissing the petition.

For these reasons I respectfully DISSENT.

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8423

WILLIAM NEAL MOORE,

Petitioner-Appellant,

versus

RALPH KEMP,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING
(Filed October 7, 1987)

BEFORE: RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONSON, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellee, Ralph Kemp, is denied.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge
